

Exhibit 18
(Redacted)
(Previously Filed Under Seal as Dkt. 412)

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF MINNESOTA

3
4 FAIR ISAAC CORPORATION,

5 Plaintiff,

6 v. Court File No. 16-cv-1054 (WMW/DTS)

7 FEDERAL INSURANCE COMPANY,
8 an Indiana corporation, and ACE
9 AMERICAN INSURANCE COMPANY,
10 a Pennsylvania corporation,

11 Defendants.

12 VIDEO DEPOSITION

13 The following is the video deposition of
14 NEIL J. ZOLTOWSKI, taken before Jean F. Soule,
15 Notary Public, Registered Professional Reporter,
16 pursuant to Notice of Taking Deposition, at the law
17 office of Fredrikson & Byron, P.A., 200 South Sixth
18 Street, Suite 4000, Mille Lacs Conference Room,
19 Minneapolis, Minnesota, commencing at 8:09 a.m.,
20 Friday, June 14, 2019.

21 * * *

22
23 C O N F I D E N T I A L

24 ATTORNEYS' EYES ONLY

25
EXHIBIT

18

Fair Isaac Corporation vs. Federal Insurance Company, et al.

1 PROCEEDINGS
2 Whereupon, the deposition of NEIL J.
3 ZOLTOWSKI was commenced at 8:09 a.m. as follows:
4 * * *
5 THE VIDEOGRAPHER: We're on the
6 record. Today's date is June 14th, 2019. The time
7 is now 8:09 a.m. This is the deposition of Neil
8 Zoltowski in the matter of Fair Isaac Corporation
9 versus Federal Insurance Company, et al. We are
10 located at 200 South Sixth Street, Minneapolis,
11 Minnesota. The videographer's name is David
12 Jenkins, appearing on behalf of Depo International.
13 The court reporter's name is John -- Jean Soule,
14 also appearing on behalf of Depo International.
15 Will counsel please introduce
16 themselves and their affiliations?
17 MR. FLEMING: Terry Fleming and
18 Christian Hokans of the Fredrikson firm,
19 representing Defendants.
20 MS. KLIEBENSTEIN: Heather
21 Kliebenstein from Merchant & Gould, on behalf of
22 the Plaintiff.
23 THE VIDEOGRAPHER: Will counsel please
24 into -- well, will the court reporter please swear
25 in the witness?

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1 * * *
2 (Reporter's Note: The oath was
3 administered by the court reporter.)
4 MR. ZOLTOWSKI: I do.
5 * * *
6 NEIL J. ZOLTOWSKI,
7 after having been first duly sworn,
8 deposes and says under oath as follows:
9 ***
10 EXAMINATION
11 BY MR. FLEMING:
12 Q. Good morning, Mr. Zoltowski. How are
13 you doing?
14 A. I'm well, thank you.
15 Q. Okay. Why don't we start by marking
16 your actual report and reply report.
17 MR. FLEMING: What did we decide it
18 was, Exhibits?
19 MR. HOKANS: Four fifty-five.
20 MR. FLEMING: Four fifty-five and four
21 fifty-six.
22 (Discussion off the record.)
23 (Whereupon, Deposition Exhibit
24 Nos. 455 and 456 were marked for identification,
25 and copies are attached and hereby made a part of

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1 this deposition.)
2 THE COURT REPORTER: Should I hand it
3 to him?
4 MR. FLEMING: Please.
5 THE WITNESS: Thank you.
6 BY MR. FLEMING:
7 Q. Mr. Zoltowski, could you just verify
8 that Exhibits 455 and 456 are your initial expert
9 report and rebuttal report?
10 A. The -- 455 is my initial expert
11 report, 456 is my reply report, although it does
12 not have the exhibits attached or the schedules.
13 Q. Okay. I will get a -- I will attach
14 those schedules before we end today.
15 A. I know the -- one of the schedules, I
16 believe Schedule 5.0, is -- it's fairly long, I
17 think over 2,000 pages. So I'm not sure you need
18 to print that one out, unless --
19 Q. Not going to --
20 A. -- you want to.
21 Q. -- attach that one.
22 A. Want that one.
23 Q. All right. Is your resume attached as
24 the first schedule to your initial report?
25 A. It is.

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1 Q. The education section of your resume
2 lists a B.A. in economics; is that right?
3 A. That's correct.
4 Q. Is that your only degree from a
5 college or a university?
6 A. I have -- I've done coursework in --
7 Masters coursework at Boston University, but I did
8 not receive a degree.
9 Q. At Boston College, did you say?
10 A. University.
11 Q. Boston University. How many courses
12 did you take?
13 A. Gosh, it was over ten years ago. I
14 think it was a semester or two, part-time. So it
15 was either two or three, if I recall correctly.
16 Q. What were the courses in?
17 A. They were part of the Masters
18 framework for economics at Boston University.
19 Q. Why didn't you complete it?
20 A. I became a partner with my firm, and
21 the travel became too much to try to keep up with
22 the education on top of all of the work.
23 Q. So, in response to my question whether
24 the B.A. in economics is your only degree from a
25 college or university, your answer would be yes,

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1 that is the only degree, correct?
2 **A. That's correct.**
3 **Q. Are you a certified public accountant?**
4 **A. I am not.**
5 **Q. Do you have any training in**
6 **accounting?**
7 **A. I've taken accounting courses as part**
8 **of my Bachelor's degree, and, then, also over the**
9 **course of my career of 23 years I've done a number**
10 **of trainings, either as part of certain**
11 **certifications or as part of certain firms that**
12 **I've been an employee at.**
13 **Q. What accounting courses did you take?**
14 **A. I believe in my Bachelor's degree one**
15 **was Introduction to Accounting, and I think there**
16 **was a cost accounting one as well.**
17 **Q. Do you have any experience with the**
18 **pricing of software?**
19 **A. Other than -- I guess I would answer**
20 **that with yes, as part of my work as a consultant**
21 **and expert witness related to damages, but I have**
22 **not held a position within a company where I've**
23 **priced software.**
24 **Q. What has been your experience as an**
25 **expert with regard to the pricing of software?**

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1 **A. I have managed several cases or served**
2 **as an expert witness where I've rendered opinions**
3 **or supported an expert who has rendered opinions**
4 **related to the value of software when it comes to**
5 **damages in those particular cases.**
6 **Q. And in what cases did -- did you say**
7 **you testified as a witness in those cases?**
8 **A. In certain cases. In others I was the**
9 **lead or the first lieutenant, I guess you would**
10 **say, managing the case for the testifier.**
11 **Q. Can you identify those cases where you**
12 **were a testifying witness?**
13 **A. In cases that involved software**
14 **included Personnel Department v. CareerBuilder,**
15 **which is the fourth one down on page 3 of my CV.**
16 **Fitness Gaming Corporation v. ICON Health & Fitness**
17 **related to software per se. It was the exercise**
18 **equipment that included gaming, gaming technology**
19 **on it, which includes software. The two Symantec**
20 **matters on the top of page 4 both included software.**
21 **Minitab v. EngineRoom included software, statistical**
22 **software. I believe Top Agent Network v. Zillow**
23 **included software. Adobe Systems V. A & S**
24 **Electronics related to the resale of software.**
25 **Smartling v. Easyling and Skawa included -- the**

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1 **products at issue were software. However, the**
2 **issues were related to the trademarks and trade**
3 **dress of that software. I don't recall if Brooks**
4 **Automation v. PTB Sales included software or not,**
5 **it may have, as part of the cryogenic technology**
6 **that case focused on. And I don't have a listing**
7 **of all the cases I've managed over my career, which**
8 **has spanned hundreds, but I know some of those have**
9 **included software.**
10 **Q. Right. And in response to my question**
11 **as to those cases in which you testified as an**
12 **expert witness in the cases that involved software**
13 **licensing, have you identified all of those?**
14 **A. To the best of my knowledge, yes.**
15 **Q. Okay. What is your claimed area of**
16 **expertise in this case?**
17 **A. I am providing expert opinions related**
18 **to economic damages.**
19 **Q. How many times have you testified as**
20 **an expert witness at trial?**
21 **A. At trial? I just testified last week,**
22 **and I forget if that's third or fourth. I think**
23 **it's four.**
24 **Q. Four times?**
25 **A. Four times.**

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1 **Q. Has the court ever -- has a court ever**
2 **excluded your testimony?**
3 **A. Uh, no.**
4 **Q. How many breach of contract cases have**
5 **you worked on involving software license agreements?**
6 **A. To answer that with any specificity, I**
7 **would have to go back through my career of cases**
8 **I've worked on and managed. I can go through my CV**
9 **in terms of where I've been serving as an expert.**
10 **And could you repeat your question for me just so I**
11 **can make sure I answer it correctly?**
12 **Q. How many breach of contract -- contract**
13 **cases have you worked on involving software license**
14 **agreements?**
15 **A. I don't believe I've served as an**
16 **expert where I've rendered opinions in that regard,**
17 **but I do recall that there have been cases where**
18 **I've served as an -- or served as a -- an employee**
19 **or a partner who has been supporting an expert**
20 **related to breach of contract damages in terms of**
21 **software agreements. Again, I would have to go**
22 **back through my career and look at the cases.**
23 **Q. So, in response to my question, you**
24 **have not worked on any prior cases as an expert**
25 **witness involving software license agreements in**

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1 which there was a breach of contract claim?
2 **A. That's correct.**
3 Q. Have you -- How many cases involving
4 software license agreements have you worked on in
5 which there have been copyright infringement claims?
6 **A. Adobe Systems v. A & S Electronics**
7 **involved the resale of Adobe software products. So**
8 **it was a reseller agreement, not -- maybe not a**
9 **software license per se, but that's one. And,**
10 **then, as I stated, the Brooks Automation v. PTB**
11 **Sales case has copyright infringement claims. I**
12 **just don't recall if there was a software component**
13 **related to this cryogenic technology or not. And,**
14 **then, with the caveat that I could go back through**
15 **my list of hundreds of cases and let you know if**
16 **there are cases where there were copyright**
17 **infringement allegations that I worked on that**
18 **related to software licenses.**
19 Q. Have you testified as an expert in any
20 case involving copyrights in which you opined on
21 lost sales?
22 **A. I just want to make sure I understand**
23 **your question. You're saying -- is it correct that**
24 **you're saying actual damages quantification related**
25 **to lost sales by the plaintiff?**

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1 Q. Yes.
2 **A. Okay. Would you like me to go through**
3 **my list again?**
4 Q. If that will help you answer the
5 question.
6 **A. Sure. And just to be clear, is your**
7 **question either as a plaintiff or defendant?**
8 Q. Correct.
9 **A. Each of these copyright cases, Adobe**
10 **Systems v. A & S Electronics, again, Brooks**
11 **Automation, v. PTB Sales, Kangaroo Manufacturing v.**
12 **Amazon, Pennies2Platinum v. Amazon, all included**
13 **copyright infringement allegations where one of the**
14 **damages remedies that was opined -- that I opined**
15 **to or rebutted related to actual damages of lost**
16 **sales.**
17 Q. Can you go to the beginning of your
18 initial report, the first paragraph?
19 **A. Okay.**
20 Q. You say in the first paragraph that
21 you have provided financial and economic consulting
22 services, including economic valuation of
23 intellectual property, such as copyrights; is that
24 right?
25 **A. Uh, correct.**

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1 Q. How do you generally go about
2 ascertaining the economic value of a copyrighted
3 work?
4 **A. And are you talking about just a**
5 **valuation of a copyright or are you talking about**
6 **in the context of litigation related to damages?**
7 Q. Let's talk about valuation first, and
8 then let's talk about litigation?
9 **A. Sure. From a valuation perspective,**
10 **obviously, it would depend on what the copyright is**
11 **and what the reason for the valuation is, but there**
12 **are typically three approaches to valuation: the**
13 **market approach, the cost approach, and the income**
14 **approach. And depending on the information**
15 **available, the reasons for the valuation, you could**
16 **use one or multiple of those approaches in your**
17 **valuation of those copyrights or that copyright.**
18 Q. What about with respect to litigation?
19 **A. With litigation, it would depend upon**
20 **the facts and circumstances and information**
21 **available. My understanding of the Copyright Act**
22 **and the statute as it relates to damages is that**
23 **actual damages and -- actual damages suffered by a**
24 **plaintiff are available as a measure of damages,**
25 **and, then, disgorgement of defendants' profits**

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1 **would be another category of damages available**
2 **under the statute.**
3 Q. So, in this case, you haven't done any
4 valuation using a market approach, cost approach or
5 income approach; is that fair?
6 **A. I guess I would answer the question**
7 **this way, which is, components of all of those**
8 **approaches are typically embedded in damages**
9 **quantification. I didn't set out to use one of**
10 **those specific approaches because in this case we**
11 **are not valuing a copyright, we are quantifying**
12 **damages related to the harm suffered or the**
13 **improper benefits realized by the defendant, and,**
14 **therefore, the framework doesn't lend itself to**
15 **using one of those three approaches in -- as far as**
16 **the information available in this case.**
17 Q. Let me -- let me follow up on that.
18 Are you saying that you did use the
19 market approach or the market valuation method in
20 any way with respect to your expert report in this
21 case or not?
22 **A. I would answer that by saying I**
23 **assessed the information available and understood**
24 **that there were facts and circumstances surrounding**
25 **the negotiations between the parties, as well as**

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1 other agreements that FICO has entered into, and
2 based upon that information, I concluded that most
3 of that information was irrelevant to the
4 quantification of damages for this -- these two
5 particular parties.
6 Q. Let me see if I understand your
7 testimony.
8 You considered the negotiations
9 between the parties, but you ultimately determined
10 that that was not relevant with respect to your
11 expert opinion as to lost profits; is that fair?
12 A. I don't think that's completely
13 correct. I think the negotiations -- or the failed
14 negotiations, I should say, were relevant to
15 helping me understand the facts and circumstances
16 between the parties, which then assisted in my
17 determination of damages as it relates to the --
18 what I felt the parties would have entered into for
19 an agreement.
20 Q. So are you saying that the negotiations
21 of the parties was relevant to your expert opinion
22 only as to helping you understand the context and
23 the background?
24 A. The negotiations -- I guess the way I
25 would answer it is this way, and, that is, this

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1 construct is different than many other cases in
2 that we had a breach of a contract and the parties
3 terminated a license and the parties negotiated to
4 renew that license and those negotiations failed,
5 and at that point the plaintiff continued using the
6 software without authorization. And, therefore,
7 that helped me in understanding the framework or
8 structure as to how I would quantify damages
9 between the parties.
10 Q. So when you earlier said that you
11 considered the negotiations of the parties and you
12 considered the other software license agreements
13 but ultimately determined they were not relevant
14 with respect to the opinion that you were providing,
15 what did you mean by that?
16 A. I said most of the information was
17 irrelevant. So the negotiations were relevant.
18 The other agreements, after I assessed them, I
19 determined were irrelevant because the construct of
20 those agreements did not factor into -- or did not
21 have the same set of facts and circumstances
22 related to two parties who were at that point
23 adversarial based upon a breach of the contract and
24 a termination of a contract and a renegotiation
25 that failed of that contract.

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1 Q. So when you said that you considered
2 the negotiations of the parties and the other
3 software license agreements but ultimately
4 determined that they were not relevant to your
5 opinion, what you meant by that was that you
6 considered the other software license agreements
7 and those were not relevant?
8 A. Correct. If you read -- reread my
9 answer, I said most of the information is not
10 relevant. So I guess the way I would categorize
11 that is the negotiations were relevant. I also
12 looked at the agreements, but the agreements I
13 determined were irrelevant.
14 Q. Okay. And how many other agreements
15 did you look at? First of all, what agreements did
16 you look at?
17 A. If I recall, there were a number of
18 agreements that were exhibits to Mr. Waid's
19 deposition -- I think his second deposition, if I
20 recall correctly -- and I or the persons under my
21 direction reviewed those.
22 Q. Okay. Other than those agreements,
23 did you review any other software license agreements
24 involving FICO and Blaze?
25 A. I know there were a number of other

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1 ones that we did review at some point, I just don't
2 recall all of them, and I know there were a number
3 that were summarized by Mr. Bakewell, that if we
4 hadn't looked at those previously we looked at
5 subsequently and had the same determination, which
6 was they were not relevant to the analysis.
7 Q. Just ballpark, what -- what is the
8 number of other FICO software license agreements
9 involving Blaze that you reviewed?
10 A. At this point, it would be any that
11 were produced in this -- oh, I'm sorry, not
12 produced, but any that were cited by Mr. Bakewell
13 and, then, that were part of the Waid deposition.
14 There might be others, but those are the ones I
15 recall as I sit here today.
16 Q. Okay. Did you review any other
17 software license agreements other than those cited
18 by Mr. Bakewell and that were attached as exhibits
19 in Mr. Waid's depositions?
20 A. As I just stated, there may have been,
21 I just don't recall as I sit here today.
22 Q. Now, earlier, when you were talking
23 about the background circumstances, you said that
24 there was a breach of contract and the parties
25 terminated the license; is that right?

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Fair Isaac Corporation vs. Federal Insurance Company, et al.

<p>1 A. That may have been what I said, yes.</p> <p>2 Q. Okay. Now, you're not making any</p> <p>3 expert opinion as to liability in this case, right?</p> <p>4 A. I am not.</p> <p>5 Q. So when you say there was a breach of</p> <p>6 contract, you're not stating an expert opinion, are</p> <p>7 you?</p> <p>8 A. I am not, and maybe it's -- I</p> <p>9 misspoke. The agreement was terminated.</p> <p>10 Q. Okay. When you say that the parties</p> <p>11 terminated the license, are you suggesting that</p> <p>12 FICO and Federal agreed to terminate the license?</p> <p>13 A. No. I'm just stating that the parties</p> <p>14 terminated the license. I believe FICO sent notice</p> <p>15 to defendants that it was terminating the license</p> <p>16 based upon the assignment provision and a breach of</p> <p>17 the contract based upon certain provisions within</p> <p>18 that contract.</p> <p>19 Q. Okay. Just so that I'm clear, is it</p> <p>20 your understanding that the parties, meaning FICO</p> <p>21 and Federal, voluntarily terminated the contract?</p> <p>22 A. As I stated, I know FICO sent notice</p> <p>23 to terminate the contract after failed renegotiations</p> <p>24 of that contract.</p> <p>25 Q. Okay. So earlier when you said that</p> <p style="text-align: right;">Page 19</p>	<p>1 question a little better. I'm sorry.</p> <p>2 Q. Well, you've testified -- you have</p> <p>3 testified as an expert in copyright cases involving</p> <p>4 lost profits, right?</p> <p>5 A. Correct.</p> <p>6 Q. Okay. And you also worked as a key</p> <p>7 member, you've referenced several times, in those</p> <p>8 type of cases, also, correct?</p> <p>9 A. That's correct.</p> <p>10 Q. And my question is, how do you</p> <p>11 generally go about determining the lost profits in</p> <p>12 those cases?</p> <p>13 A. It would depend on the facts and</p> <p>14 circumstances of the case, but generally you're</p> <p>15 looking at what is the harm suffered through the</p> <p>16 infringement of those copyrights in those</p> <p>17 particular matters, and you're looking at based</p> <p>18 upon that infringement are there lost sales that</p> <p>19 have occurred and have been suffered by the</p> <p>20 plaintiff, and, then, from those lost sales are</p> <p>21 there profits that, you know, are generated from</p> <p>22 those revenues from those lost sales.</p> <p>23 Q. And how do you generally go about</p> <p>24 determining lost sales?</p> <p>25 A. You would look at the sales that were</p> <p style="text-align: right;">Page 21</p>
<p>1 the parties terminated the contract, what you are</p> <p>2 now saying is that FICO sent notice of a</p> <p>3 termination of the contract; is that fair?</p> <p>4 A. That's fair. Again, I'm not offering</p> <p>5 an opinion as to liability, I'm just stating what I</p> <p>6 understand to be certain facts and circumstances.</p> <p>7 Q. All right. So we were talking about</p> <p>8 your background, as stated in the first paragraph</p> <p>9 of your initial report, and specifically the</p> <p>10 economic valuation of intellectual property such as</p> <p>11 copyright, we talked about the three valuation</p> <p>12 approaches, and you said in litigation there's two</p> <p>13 types of remedies: actual and disgorgement.</p> <p>14 How do you typically go about</p> <p>15 ascertaining the actual damages in copyright cases?</p> <p>16 A. Actual damages could be quantified in</p> <p>17 different ways. It could be lost profits. In the</p> <p>18 situation like this, it's the lost license fees to</p> <p>19 FICO. It would really just depend on the facts and</p> <p>20 circumstances of the case as to what those actual</p> <p>21 damages may be.</p> <p>22 Q. So they're -- you don't have a general</p> <p>23 way of ascertaining lost license fees or lost</p> <p>24 profits in copyright cases?</p> <p>25 A. I guess I'd need you to explain your</p> <p style="text-align: right;">Page 20</p>	<p>1 made by a defendant -- and, again, it depends on</p> <p>2 the facts and circumstances of the case. But</p> <p>3 generally you would see if there were sales made by</p> <p>4 defendant through those infringements that then</p> <p>5 would have been made by the plaintiff, therefore,</p> <p>6 being lost sales, and, then, from those lost sales,</p> <p>7 you would determine the profits that are</p> <p>8 attributable to those revenues.</p> <p>9 In this situation, it's not lost</p> <p>10 profits per se, but it's a license agreement, and,</p> <p>11 therefore, it's lost license fees. So it's a</p> <p>12 little bit of a different construct.</p> <p>13 Q. Have you testified as an expert in</p> <p>14 other cases involving lost license fees?</p> <p>15 A. I've worked on and testified in a</p> <p>16 number of cases involving license agreements and</p> <p>17 assessing those license agreements to determine if</p> <p>18 the value of those agreements is comparable to an</p> <p>19 agreement that would be the issue in, you know, the</p> <p>20 particular case I'm working on. But I don't recall</p> <p>21 any particular cases that fit the construct I think</p> <p>22 you're stating.</p> <p>23 Q. So you have never testified before in</p> <p>24 a case involving software licenses on the topic of</p> <p>25 lost profits?</p> <p style="text-align: right;">Page 22</p>

1 **A. Could you repeat that question?**
2 MR. FLEMING: Could you read the
3 question again?
4 (Whereupon, the court reporter read
5 back the following question: "So you have never
6 testified before in a case involving software
7 licenses on the topic of lost profits?")
8 THE WITNESS: As I stated prior, the
9 Brooks Automation v. PTB Sales case I believe
10 involved lost profits, I just don't forget -- I --
11 I forget if it involved software. There are a
12 number of other cases on here, like the two Symantec
13 cases, the Minitab case and -- I'm trying to see if
14 there are others, that relate to software. And
15 although they did not relate to lost profits, I
16 would say they related to -- those related to
17 reasonable royalties, which would be the market
18 approach to valuation. And the Top Agent Network,
19 which relates to trade secret misappropriation of
20 software, that was a cost approach that I took on
21 that case.
22 BY MR. FLEMING:
23 Q. So, in response to my question as to
24 whether you've testified before in a case involving
25 a software license on the topic of lost profits, is

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1 your response that the one case may be the Brooks
2 case except it's not clear whether that involved
3 software or not?
4 **A. That's correct. I know I've worked on**
5 **a number of cases that I've managed that related to**
6 **those issues. But, again, I'd have to go revisit**
7 **the hundreds of cases I've worked on to get you a**
8 **clear list of those.**
9 Q. Right. And apart from the cases that
10 you worked on, in response to my question about
11 cases you've worked on as an expert witness, the
12 one case that you've worked on as an expert witness
13 would be the Brooks case, except with the
14 qualification that that might not have involved
15 software?
16 **A. Correct.**
17 Q. Okay. Now, in the first paragraph of
18 your initial report you also say that you have --
19 you identify in your report the various industries
20 that you've worked in -- not that you've worked in,
21 but the industries, the various industries in which
22 you have provided expert testimony in?
23 **A. In my report or in my CV? I'm sorry,**
24 **where are you?**
25 Q. In your CV.

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1 **A. Correct. It's just a select**
2 **representation of industries. There's --**
3 Q. Where is that?
4 **A. There might be others.**
5 Q. Where in your report do you reference
6 that?
7 **A. I don't reference it in my report, but**
8 **there is a -- it's part of my CV, on page 2 of my**
9 **CV.**
10 Q. So when you identify on page 2 various
11 representative industry experience, you identify
12 insurance as one of those areas or one of those
13 industries; is that right?
14 **A. That's right.**
15 Q. What prior experience have you had
16 with respect to insurance?
17 **A. The first case under my Expert**
18 **Designations and Testimony is Great American**
19 **Insurance and Novartis v. TA Operating Corp., that's**
20 **one; and, then, the Lon Sherman v. Mark Shub case,**
21 **which is the fifth one down, also involved insurance,**
22 **I believe, related to a -- a trust, if I remember**
23 **that correctly.**
24 Q. So the two cases that you've worked on
25 as an expert in which the insurance industry was

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1 involved is the Great American Insurance Company of
2 New York case, and the Competitive Edge case?
3 **A. No. It was the fifth one down, the**
4 **Lon Sherman v. Mark Shub case.**
5 Q. Oh. And what was the general -- can
6 you give me some background just generally on what
7 the Great American Insurance case related to?
8 **A. I will try my best, that was over ten**
9 **years ago. But it related to a -- a truckload of**
10 **pharmaceuticals that was stolen from a truck stop**
11 **in New Jersey, and the question was what is the**
12 **value of those pharmaceuticals that were taken, and**
13 **the insurance piece of that was that -- I believe**
14 **the insurance company was try -- stepping in on**
15 **behalf of Novartis, and I don't recall the issues**
16 **surrounding insurance per se in that case, since it**
17 **was ten years ago.**
18 Q. So your recollection is that the
19 plaintiff, Great American Insurance Company had
20 stepped in on behalf of the initial plaintiff as
21 subrogor or some such thing?
22 **A. That's what I can recall.**
23 Q. Sure. But you can't recall whether
24 the case actually involved the insurance industry
25 as such, is that fair, also?

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1 **A. I know it did involve the insurance**
2 **industry to a -- some degree, I just don't recall**
3 **exactly what those issues were given it was so long**
4 **ago.**

5 **Q. Okay. And did it involve anything**
6 **other than insurance coverage issues?**

7 **A. I don't believe so.**

8 **Q. Okay. Just so that we're clear,**
9 **you're saying that it did just concern insurance**
10 **coverage issues or it did not involve just**
11 **insurance coverage issues?**

12 **A. I believe it may have just included**
13 **insurance coverage issues.**

14 **Q. Okay. And what about the second case**
15 **you identified, the Lon Sherman matter, just**
16 **generally what did that case involve?**

17 **A. It involved exactly what it states**
18 **there, is all I can tell you. That was a small**
19 **case that I worked on ten years ago, and I have**
20 **very little recollection of it.**

21 **Q. The description doesn't appear to**
22 **relate to the insurance industry at all; isn't that**
23 **right?**

24 **A. That's correct.**

25 **Q. Okay. But your recollection is that**

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1 there was some insurance industry connection with
2 that case?

3 **A. Yes, because it -- I do recall it was**
4 **a malpractice dispute which involved malpractice**
5 **insurance.**

6 **Q. Okay. So, again, the second case that**
7 **you identified probably just involved an insurance**
8 **coverage issue, that was the insurance industry**
9 **component; is that fair?**

10 **A. I honestly don't recall.**

11 **Q. So when you identify on your resume**
12 **that you have representative industry experience in**
13 **insurance, you are referencing there just two**
14 **cases, both of which just involved insurance**
15 **coverage issues and no other fact or circumstance**
16 **relating to the insurance industry?**

17 **A. Those are the two where I've been**
18 **designated as an expert. There -- if I recall**
19 **correctly, I just can't speak to the hundreds of**
20 **cases I've worked on where others have involved**
21 **insurance related issues that I've worked on over**
22 **the course of my 23-year career.**

23 **Q. Okay. But as you sit here today, when**
24 **you have identified insurance as one of the**
25 **representative industry experience that you have**

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1 had, the only thing that you can recall today are
2 two cases involving insurance coverage issues, right?

3 **A. Yes, with the caveat that I don't**
4 **recall exactly the issues of the Shub case that I**
5 **talked about, which may have involved more than**
6 **just the insurance coverage issues.**

7 **Q. Earlier in your testimony you said**
8 **that three of the valuation approaches that you use**
9 **when appraising copyrights are the market approach,**
10 **the cost approach and the income approach, correct?**

11 **A. Correct.**

12 **Q. And you talked about and we discussed**
13 **the extent to which you used the market approach in**
14 **your expert report in this case. To what extent,**
15 **if any, did you use the cost approach in connection**
16 **with your expert report in this case?**

17 **A. In terms of the cost approach, what**
18 **one is looking at is what would be the costs to, in**
19 **this situation, replace the FICO Blaze Advisor®**
20 **software, and when I look at the available options,**
21 **while there may have been options out there,**
22 **defendants have continued to use the Blaze Advisor**
23 **software and have not replaced it over the course**
24 **of these last three plus years.**

25

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1
2

3 **But, again, that would be more than three-and-a-half**
4 **years following the termination of the license.**

5 **Q. And how do the factual circumstances**
6 **that you just related, how do those respond to the**
7 **question as to whether you used the cost approach**
8 **in your expert report?**

9 **A. Well, I assessed that there were -- or**
10 **if there were any available options out there, and**
11 **my conclusion is that based upon the activities of**
12 **the plaintiffs, in that they decided not to replace**
13 **the software over the course of three plus years,**
14 **there were -- there -- in their eyes not an option**
15 **available for them to use in replacing the Blaze**
16 **Advisor software, and, hence, they chose to continue**
17 **using the Blaze Advisor software.**

18 **Q. Well, did you take any other steps to**
19 **determine whether there were -- whether there are**
20 **alternatives?**

21 **A. I understand there are certain**
22 **products out there that provide decision management**
23 **software solutions.**

24 **Q. Okay. And what are those?**

25 **A. I know IBM provides one. I think**

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1 [REDACTED]
2 [REDACTED]
3 I don't know any of the others off the top of my
4 head.
5 Q. What are the cost of those
6 alternatives?
7 A. I don't know the cost of the IBM
8 product. I don't think it actually matters to the
9 construct here. [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 Q. Why did you say that cost of those
13 does not matter to this construct?
14 A. Because the plaintiffs have not
15 migrated away from the Blaze Advisor product, which
16 demonstrates to me that it's an essential part of
17 their business, because if they could have easily
18 replaced it they would have in the last three years.
19 Q. If, in fact, the alternative that
20 [REDACTED]
21 [REDACTED]
22 on the lost profits analysis and specifically
23 FICO's claimed damages based on its lost license
24 fees?
25 A. Because in this situation what I'm

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1 quantifying is the harm to FICO based upon the
2 unauthorized usage of software for three plus
3 years. I'm not looking back to a hypothetical
4 construct of the two parties negotiating for a
5 license to the Blaze Advisor software at this -- at
6 that time. We know the parties did negotiate and
7 failed to come to an agreement.
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 Q. Do you understand that Federal's
14 position in this case has been that there has been
15 no breach of the contract, so they are able to
16 continue to use the software license agreement,
17 which is a perpetual enterprise license?
18 A. My understanding is, as I stated
19 previously, that the agreement has been terminated,
20 and I'm operating under that construct.
21 Q. So why didn't you consider what you
22 just characterized as the hypothetical concept of
23 two parties negotiating a software license
24 agreement?
25 A. Because in this situation we have two

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1 parties that did negotiate. So I don't need to
2 re-create a fantasy world of a hypothetical
3 negotiation between two parties who have already
4 negotiated and failed to come to an agreement. We
5 have facts on the record. We have evidence of the
6 two parties negotiating. We know the parties
7 failed to come to an agreement.
8 Q. Have you in other cases used this
9 hypothetical concept of two parties negotiating a
10 software license agreement?
11 A. I have used the hypothetical
12 negotiation in a number of cases, mostly related to
13 patent infringement, and those patents may have
14 related to or involved software, but that's part of
15 the case law under the patent damages, and that
16 guide -- provides guidance that a hypothetical
17 negotiation framework is appropriate to use in
18 those instances.
19 Q. So it would be your testimony that
20 this hypothetical negotiation concept would be
21 appropriate in cases involving patent damages but
22 not outside of that area based on the case law?
23 A. I didn't state that. I stated that
24 I've worked on cases where I've used the
25 hypothetical negotiation related to patent

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1 infringement allegations.
2 Q. And my question is, do you believe it
3 is appropriate to use that same concept outside of
4 the patent damages --
5 A. It would depend --
6 Q. -- area?
7 A. -- on the facts and circumstances of
8 the case. But I would also state that while the
9 patent law states that the hypothetical licensor
10 and licensee are willing licensor and willing
11 licensee and will come to an agreement. I don't
12 believe that same construct is specific to other
13 forms of intellectual property damages. And in a
14 situation like this, where we have a terminated
15 license and a breach of the contract, you know,
16 FICO has no reason and does not need to willingly
17 enter into a license.
18 Q. So have you ever used the hypothetical
19 negotiation concept outside of the -- outside of
20 cases involving patent damages?
21 A. I may have, I just don't recall the
22 facts and circumstances surrounding it.
23 Q. So you may have. Does that mean it
24 would be appropriate to use that concept outside of
25 the patent damages area?

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1 **A. Again, it would depend on the facts**
2 **and circumstances of the particular case. I don't**
3 **feel it lends itself to this particular case.**
4 Q. But in response to my question, you do
5 believe that that concept would be available and
6 appropriate outside of the patent damages area?
7 **A. Again, I think it would depend on the**
8 **facts and circumstances of the case. But the**
9 **hypothetical negotiation construct is -- I believe**
10 **is different when it comes to other forms of**
11 **intellectual property.**
12 Q. How --
13 **A. And it doesn't have the same structure**
14 **in terms of strictly defining that the parties have**
15 **to enter into a license.**
16 Q. All right. Your report lists
17 interviews with Bick Whitener and William Waid; is
18 that correct?
19 **A. That's correct.**
20 Q. Have you talked with anyone else at
21 FICO in preparing your reports?
22 **A. No, I have not.**
23 Q. Going back to your initial report, in
24 paragraphs 5 and 6 you set out what your assignment
25 was in this case; is that correct?

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1 **A. That's correct.**
2 Q. And what is your assignment or what
3 was your assignment?
4 **A. As I stated in my report, I have been**
5 **retained as a damages expert in this matter by**
6 **Merchant & Gould, counsel for Plaintiff FICO, to**
7 **assess and quantify the economic damages sustained**
8 **by FICO and the economic benefits received by**
9 **defendants, assuming that the defendants are found**
10 **liable for the alleged wrongful acts described in**
11 **the Second Amended Complaint, among other things,**
12 **and these claims include breach of contract and**
13 **copyright infringement.**
14 Q. So what was your methodology for
15 assessing and quantifying these two categories of
16 damages in this case, can you describe that in
17 plain terms?
18 **A. Sure. I assessed the available**
19 **information, I under -- got an understanding from a**
20 **copyright infringement perspective the available**
21 **remedies, which I know through my career, but I**
22 **always like to confirm that through authoritative**
23 **text, as well as speaking with counsel, to make**
24 **sure I understand the categories of damages**
25 **available.**

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1 **After reviewing the information, I**
2 **quantified damages for the breach of contract**
3 **related to -- or in the form of the lost license**
4 **fees to FICO based upon a named application license;**
5 **and as for copyright infringement, I quantified**
6 **damages based upon the actual harm suffered by**
7 **FICO, which is also in the form of the lost license**
8 **fees; and, then, also quantified damages based upon**
9 **the improper economic benefits received by defendants**
10 **through their unauthorized use of the software.**
11 MR. FLEMING: All right. I'm going on
12 to a different topic. Why don't we take a
13 five-minute break, we've been going about an hour.
14 THE WITNESS: Is there a restroom
15 nearby?
16 THE VIDEOGRAPHER: We're going off the
17 record. The time is now 9:03 a.m.
18 (Break from 9:03 to 9:11.)
19 THE VIDEOGRAPHER: We're back on the
20 record. The time is now 9:11 a.m.
21 BY MR. FLEMING:
22 Q. Mr. Zoltowski, could you turn to page
23 38 of your initial report?
24 **A. Okay.**
25 Q. It's your opinion, as reflected in

Page 37

1 your initial report on page 38, that FICO lost a
2 deployment license, development seat license,
3 support and maintenance fees totaling \$37.4 million
4 from Federal's unlicensed and unauthorized use of
5 Blaze; is that right?
6 **A. Correct, between the time period**
7 **April 2010 and December 2019.**
8 Q. Now, you reached these lost license
9 fees -- if I can characterize that longer description
10 that you provided, these lost license fees, you
11 reached those lost license fee numbers by utilizing
12 the price of each of the 15 named applications that
13 Mr. Waid provided to you based upon FICO's nine
14 criteria as defined in FICO's rate tables; is that
15 right?
16 **A. That's a fair summary.**
17 MR. FLEMING: Now, can you mark this
18 as the next exhibit?
19 THE REPORTER: That's 457.
20 (Whereupon, Deposition Exhibit No. 457
21 was marked for identification, and a copy is
22 attached and hereby made a part of this deposition.)
23 THE WITNESS: Thank you.
24 BY MR. FLEMING:
25 Q. What I'm showing you is a document

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1 marked as Exhibit 457, which I will represent to
2 you is attached as a exhibit to a declaration that
3 Mr. Waid signed. Are the last two pages of this
4 exhibit, the second to the last page, first of all,
5 does that set out the nine criteria that you
6 reference?

7 **A. Yes.**

8 **Q.** And on the next page is the FICO rate
9 tables that you referenced?

10 **A. That's correct.**

11 **Q.** Now, Mr. Waid did the analysis of how
12 to classify the 15 applications as small, medium,
13 large or very large; isn't that right?

14 **A. Based upon his expertise of pricing
15 these licenses for many years, that's correct.**

16 **Q.** Okay. And I wasn't asking as to
17 whether he uses expertise or not. My question is
18 whether it was Mr. Waid who did the analysis as to
19 how to classify those 15 applications as to small,
20 medium, large or very large?

21 **A. Mr. Waid did provide me that
22 information, correct.**

23 **Q.** Okay. And how did he do that?

24 **A. He took information that was provided
25 by the defendants regarding those applications and**

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1 **used that information based upon this application
2 sizing matrix to size those based upon that
3 information, and based upon that information
4 related to the sizing I used the pricing matrix to
5 price the named application license for each of
6 those applications.**

7 **Q.** So, for example, the -- on page 40,
8 Mr. Waid did the analysis for CSI Express and
9 determined, with respect to the last page of
10 Exhibit 457, that it was a large -- it was large
11 for purposes of this category pricing matrix,
12 correct?

13 **A. Correct.**

14 **Q.** Okay. Can you tell me in detail how
15 Mr. Waid did that, how he made the determination
16 that it was large?

17 **A. That's a better question for Mr. Waid
18 since he is the one who is -- has the expertise in
19 pricing.**

1

2

3 **Q.** So when you say that is a better
4 question to ask Mr. Waid than you, is that because
5 you do not have the expertise to make the
6 determination as to whether to categorize each
7 application in accordance with this category
8 pricing matrix on the last page of Exhibit 457?

9 **A. I have the expertise to take the
10 numbers provided by the defendants to match up to
11 this application sizing matrix. However, Mr. Waid
12 uses this every day as part of his business, and,
13 therefore, I appreciated his expertise in
14 determining the appropriate size. And, then, from
15 that information it -- one would go -- which is
16 what I did, is go to the pricing matrix and price
17 each named application based upon that information.**

18 **Q.** Well, did you have any input into the
19 determination of the size, which is reflected in
20 the graph on page 40, Table 7?

21 **A. I understood what the information was
22 that was provided by defendants, and I understand
23 this matrix from speaking with Mr. Waid and through
24 his deposition, but Mr. Waid ultimately sized each
25 of these applications.**

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1 **Q.** And you didn't do any independent
2 analysis as to the size, you, rather, relied upon
3 Mr. Waid doing that analysis?

4 **A. I relied upon the person whose
5 expertise every day of pricing software based upon
6 this sizing matrix, that's correct.**

7 **Q.** Okay. And just to make sure you
8 understand my question, you did not do any
9 independent analysis in determining the size of the
10 application which appears on page 40 in Table 7 of
11 your report?

12 **A. I would state it this way, which is I
13 looked at the information and understand how you
14 would plug it into the matrix, but ultimately I
15 relied upon Mr. Waid's expertise, who does this
16 every day, to confirm that the understanding I had
17 was in line with his understanding and how he would
18 price it.**

19 **Q.** Okay. Mr. Zoltowski, we all
20 understand how the matrix is used.

21 My question is, rather, whether you
22 did any independent analysis to determine the
23 accuracy of the size of the application as
24 reflected in this column called Size in Table 7 on
25 page 40 of your report?

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1 A. I would say it was not independent by
2 myself and my team, but it was in conjunction with
3 Mr. Waid.
4 Q. So did you question any of the
5 determinations that Mr. Waid made as to the size of
6 the application that went on to this chart on
7 page 40?
8 A. We walked through each of them and
9 made sure I was comfortable with how he sized them.
10 Q. Okay. Well, let's talk about CSI
11 Express, how did you walk through CSI Express?
12 A. I would need the data from defendants
13 to do that, because the data from the defendants is
14 what drives the sizing.
15 Q. So are you able yourself to take that
16 data and size each of these applications?
17 A. I can align them with the matrix, but
18 there are -- Mr. Waid has the expertise of using
19 this every day, and there are certain of these
20 categories I believe that outrank other categories
21 as they price, and so Mr. Waid's expertise was
22 helpful in understanding how they use this on --
23 each and every day to price their licenses. But,
24 again, I would need the data from the defendants in
25 order to walk through the sizing.

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1 Q. Are you telling me if you have that
2 data that you could size them yourself, without any
3 assistance by Mr. Waid?
4 A. I could generally understand what the
5 sizing would be. But, again, Mr. Waid has the
6 expertise to do that sizing based upon the matrix
7 which he uses every day.
8 Q. And, in any event, in this case you
9 didn't engage in that analysis, Mr. Waid did?
10 A. I engaged in that analysis with
11 Mr. Waid, as I said, in conjunction with Mr. Waid.
12 Q. Well, I thought you said that Mr. Waid
13 actually made the determination as to the size that
14 appears in the graph on page 40.
15 A. He --
16 Q. Am I wrong about that?
17 A. He made the final determination,
18 that's correct.
19 Q. Okay. Can you go through any of these
20 applications right now and tell me how Mr. Waid
21 arrived at that determination as to size?
22 A. If you'd like to provide me the data
23 from the defendants, I could do that. But, again,
24 Mr. Waid would probably be the better person to ask
25 those questions to.

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1 Q. Now, it's the classification as to
2 size that, in part, drives the rate that is applied;
3 is that right?
4 A. Correct. You take the information
5 from the sizing matrix and you would apply that to
6 the pricing matrix.
7 Q. Now, you also relied upon Mr. Waid's
8 determination that the number of development seat
9 licenses that Federal would have required to
10 maintain each of these applications, correct?
11 A. That's correct.
12 Q. And how did Mr. Waid go about making
13 those determinations?
14 A. Mr. Waid made those determinations
15 based upon the information provided by Federal or
16 if -- or -- I believe that's how he did it. I
17 don't recall, because that is his expertise related
18 to sizing in terms of development seats.
19 Q. So you didn't have any involvement in
20 the determination of the seats as reflected in the
21 column on Table 7 on page 40 of your report?
22 A. That is correct.
23 Q. And you did not conduct any
24 independent analysis?
25 A. Uh, no, I did not.

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1 Q. Can you tell me any more detail as to
2 how Mr. Waid arrived at his determination other
3 than saying he looked at information provided by
4 defendants?
5 A. I know that he used his expertise in
6 understanding of the defendants' business from the
7 license that was effective for the ten-year period
8 prior to the termination of the agreement and
9 information that was produced in this matter.
10 Q. So, in other words, the only knowledge
11 you have as to how Mr. Waid arrived at the number
12 of seats on this graph is that he used information
13 provided by defendants and he utilized his
14 expertise; is that fair?
15 A. That's fair.
16 Q. What does that mean, the number of
17 development seat licenses that Federal would have
18 required to maintain each of these applications?
19 A. Those are the number of development
20 seats, meaning the number of authorized users for
21 the development of the product at the client's site.
22 Q. Now, based upon Mr. Waid's analysis of
23 the size of the application and the development
24 seats required, you applied FICO's standard rate
25 table to determine that FICO has lost license fees

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1 of \$37.4 million, correct?
2 **A. That's correct, and that would also**
3 **include the maintenance and support fees annually.**
4 Q. Let's go to your schedule in your
5 initial report, look at Schedule 4 and Schedule 5.
6 I don't see any pages on the bottom that can
7 otherwise direct you.
8 **A. Okay.**
9 Q. Are these two schedules the summary of
10 the total lost license fees inside the United
11 States and outside the United States?
12 **A. Yes. Schedule 4 is for domestic**
13 **applications, and Schedule 5 is a summary of lost**
14 **fees for foreign applications.**
15 Q. Okay. And let's walk through how you
16 arrived at that. Let's go to Schedule 7 and 7.1.
17 **A. Okay.**
18 Q. First, how did you arrive at
19 Schedule 7.1 as to the deployment license? Do you
20 see that column in Schedule 7.1?
21 **A. I do.**
22 Q. How did you -- And you prepared these
23 tables?
24 **A. I or persons working under my**
25 **direction.**

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1 Q. Okay. And it was you or your group
2 and not Mr. Waid or somebody at FICO who prepared
3 the tables?
4 **A. That's correct. It was -- it was me**
5 **or my team, that was directed under my supervision.**
6 Q. And how did you arrive at the
7 deployment license number in Schedule 7.1?
8 **A. So, for each application, as was**
9 **identified by defendants in their interrogatory**
10 **responses as applications that utilized the Blaze**
11 **Advisor software, we then took information also**
12 **provided by the defendants related to the size of**
13 **those applications and from that information used**
14 **the application sizing matrix in conjunction with**
15 **Mr. Waid to determine the size.**
16 **For example, the first one is ADAPT,**
17 **and it's in Australia. The size for that**
18 **application was determined to be large. When you**
19 **take that information and you look at the category**
20 **pricing matrix, the deployment license fee under a**
21 **large sizing for an entity is \$750,000, and so that**
22 **was what went into that adjusted deployment**
23 **license -- or, I'm sorry, the deployment license**
24 **column.**

25 Q. And just to clarify, the \$750,000 is

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1 for a perpetual license as opposed to an annualized
2 fee?
3 **A. That's correct.**
4 Q. Okay. And, then, Schedule 7.0, you
5 take the number from the far right column entitled
6 Perpetual License, which is the sum of the
7 deployment license and the deployment seat license
8 fees; is that correct?
9 **A. I'm sorry, could you repeat that?**
10 Q. The far right column entitled
11 Perpetual License on Schedule 7.1, is that the sum
12 of the deployment licenses and the development seat
13 licenses?
14 **A. That's correct.**
15 Q. And you took that column on the far
16 right, and that is the same column that you have as
17 at first column in Schedule 7.0, right?
18 **A. That's correct.**
19 Q. And your purpose in 7.1 was to
20 determine the annual fee?
21 **A. That's correct.**
22 Q. And you determined the annual fee by
23 taking the perpetual license by a conversion factor
24 of 0.45 and, then, adding the support and
25 maintenance to that number to obtain the total

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1 license, support, and maintenance fee; is that
2 right?
3 **A. That's correct, that would be the**
4 **total license, support, and maintenance fee**
5 **annually for each of these applications.**
6 Q. And you determined the annual license
7 fee by multiplying the perpetual license number by
8 a conversion factor; is that right?

9 **A. Uh, yes. That's the standard way that**
10 **FICO converts a perpetual license to an annual**
11 **license in the ordinary course of business.**

12 Q. So you did that, and you multiply that
13 by a conversion factor of 0.45; is that right?

14 **A. That's correct.**

15 Q. And that is a number not that you came
16 up with but, rather, was provided by Mr. Waid; is
17 that right?

18 **A. It was provided by Mr. Waid and also**
19 **provided by FICO, I believe, in the interrogatory**
20 **response. And, as I stated, it's how FICO does**
21 **that conversion from perpetual to annual license in**
22 **its everyday operations.**

23 Q. And, then, you also added a annual
24 support and maintenance fee by multiplying the
25 annual license fee by 22 percent; is that right?

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<p>1 A. Correct.</p> <p>2 Q. And, again, that is a number provided</p> <p>3 by Mr. Waid and not by you independently; is that</p> <p>4 correct?</p> <p>5 A. It was provided by Mr. Waid, and it</p> <p>6 was also part of a interrogatory response. And,</p> <p>7 then, subsequently I've seen documentation related</p> <p>8 to that 22 percent fee being the standard fee that</p> <p>9 is charged by FICO in its ordinary course of</p> <p>10 business, and that change was made internally at</p> <p>11 the company sometime in 2015.</p> <p>12 Q. And let's go backwards in your report</p> <p>13 to Schedule 6.0 and 6.1.</p> <p>14 A. Okay.</p> <p>15 Q. These are the domestic named</p> <p>16 application annual fees and the domestic</p> <p>17 application perpetual license fee calculations; is</p> <p>18 that right?</p> <p>19 A. That is correct.</p> <p>20 Q. And you engaged in these calculations</p> <p>21 in the exact same manner as the calculations that</p> <p>22 we just went through with respect to Schedules 7.0</p> <p>23 and 7.1; is that right?</p> <p>24 A. That's right.</p> <p>25 Q. Let me just for example, taking CI --</p> <p style="text-align: right;">Page 51</p>	<p>1 worked in conjunction with Mr. Waid. Are you</p> <p>2 talking about something other than what you've</p> <p>3 already testified about that you haven't told me</p> <p>4 about yet?</p> <p>5 A. No, I'm not. And I think if you --</p> <p>6 Q. Okay.</p> <p>7 A. -- went back in the transcript I</p> <p>8 stated that I worked in conjunction with Mr. Waid</p> <p>9 but that he ultimately provided the sizing.</p> <p>10 Q. Right. And I didn't understand you to</p> <p>11 testify that you actually did anything other than</p> <p>12 rely upon Mr. Waid in determining the size. Do I</p> <p>13 have that wrong?</p> <p>14 A. As I stated, I worked with Mr. Waid to</p> <p>15 understand the prize -- the sizing process. So I</p> <p>16 looked at the data in conjunction with Mr. Waid.</p> <p>17 But, again, he ultimately provided the size.</p> <p>18 Q. And you didn't do any independent</p> <p>19 analysis? You're not changing your testimony about</p> <p>20 that?</p> <p>21 A. No, I'm not.</p> <p>22 Q. Okay. Let's go back, then, to</p> <p>23 Schedule 4 and 4.1. So could you explain how</p> <p>24 you -- you prepared these two chart -- these two</p> <p>25 graphs, I take it, Schedule 6.0 and 6.1 -- I'm</p> <p style="text-align: right;">Page 53</p>
<p>1 CSI Express, Mr. Waid provided the size on page 40</p> <p>2 of your report as large. So you then utilized the</p> <p>3 category pricing matrix on Exhibit 457 and took the</p> <p>4 number associated with the large application of</p> <p>5 \$750,000 and inserted it as the first entry in the</p> <p>6 column entitled employment -- Deployment License;</p> <p>7 is that right?</p> <p>8 A. That's correct, with the caveat that I</p> <p>9 worked in conjunction with Mr. Waid to determine</p> <p>10 the size. And, as I stated, he ultimately provided</p> <p>11 the size, but we worked in conjunction with him to</p> <p>12 understand that sizing and then applied that sizing</p> <p>13 to the pricing ourselves and then built these</p> <p>14 schedules from that information.</p> <p>15 Q. Yeah. I mean, you keep saying you</p> <p>16 worked in conjunction with Mr. Waid, and I'm not</p> <p>17 sure based on your testimony to date how it is that</p> <p>18 you did that, other than have Mr. Waid provide you</p> <p>19 with the size based on his expertise and his review</p> <p>20 of the information provided by Federal?</p> <p>21 A. Is that a question?</p> <p>22 Q. Well, did you do anything other than</p> <p>23 that? I mean, you've already testified as to what</p> <p>24 you did, and now you're answering your questions by</p> <p>25 saying -- qualifying your responses by saying you</p> <p style="text-align: right;">Page 52</p>	<p>1 sorry, Schedule 4.0 and Schedule 5.0?</p> <p>2 A. Correct.</p> <p>3 Q. I'm looking first at 4.0. Where did</p> <p>4 you get the first number for CSI Express for</p> <p>5 license, support, and maintenance of \$634,095?</p> <p>6 A. That --</p> <p>7 Q. Did you take that from the last column</p> <p>8 in Schedule 6.0?</p> <p>9 A. That's correct.</p> <p>10 Q. Okay. Which is the sum of the annual</p> <p>11 license and the support and maintenance, as you've</p> <p>12 described before, correct?</p> <p>13 A. That is correct.</p> <p>14 Q. And you did the same with regard to</p> <p>15 each of the other applications, both for</p> <p>16 Schedule 4.0 and Schedule 5.0, and you multiplied</p> <p>17 that by -- with regard to the United States,</p> <p>18 3.7 years, and with regard to the -- outside of the</p> <p>19 United States application by the number of years</p> <p>20 that you believed the application has been used?</p> <p>21 A. That's correct.</p> <p>22 Q. And we've just gone through the</p> <p>23 process by which you arrived at the total lost fees</p> <p>24 for the United States of 16 million approximately</p> <p>25 and outside of the United States lost license fees</p> <p style="text-align: right;">Page 54</p>

1 of approximately 21.2 million; is that right?
2 **A. That's correct.**
3 **Q.** Now, how exactly did you use your
4 expertise in arriving at those numbers other than
5 taking the information that Mr. Waid provided by
6 you and the conversion factor that Mr. Waid provided
7 to you and the annual monthly -- annual maintenance
8 fees that Mr. Waid provided to you?
9 I mean, it appears that you just
10 prepared these charts and did mathematical
11 calculations, you didn't do anything else. Do I
12 have that wrong?
13 **A. I would answer that by saying the**
14 **expertise is in understanding what the construct of**
15 **the license should be based upon the available**
16 **information, and while it may appear that it's**
17 **simply arithmetic, it is also understanding from**
18 **the available information what applications are**
19 **applicable based upon what defendants have provided**
20 **in response interrogatories, it's understanding the**
21 **copyright statute and the statute of limitations**
22 **related to the damages periods that are applicable**
23 **and appropriate for the each of the applications,**
24 **and, as I stated, working with Mr. Waid to**
25 **understand the sizing and then applying that to**

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1 **determine the pricing.**
2 **Q.** So I understand that you worked hard
3 in getting an understanding of all of those things
4 that you just itemized. But in terms of your
5 expert opinion as to the lost license fees, what
6 did you do other than provide arithmetic
7 calculations?
8 **A. I think I just answered that question.**
9 **Q.** Okay. And you didn't do anything else
10 other than what you just described, understanding
11 all those items and doing the arithmetic
12 calculations, right?
13 **A. As I stated, it's -- the expertise**
14 **comes in in understanding the appropriate structure**
15 **of the license as it relates to damages in this**
16 **case.**
17 **Q.** Now, who made the determination to
18 present the lost license fees based on annualized
19 application fees, annualized license fees for each
20 application for 15 different applications?
21 **A. I made that determination.**
22 **Q.** Had you seen that done before by FICO?
23 **A. I don't recall if they've entered into**
24 **a license that's similar to this particular license.**
25 **MR. FLEMING:** Will you mark this as

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1 the next exhibit?
2 **THE COURT REPORTER:** It's 458.
3 **(Whereupon, Deposition Exhibit No. 458**
4 **was marked for identification, and a copy is**
5 **attached and hereby made a part of this deposition.)**
6 **BY MR. FLEMING:**
7 **Q.** Showing you what's been marked as 458,
8 have you seen this declaration of Mr. Waid before?
9 **A. I have.**
10 **Q.** And you saw this declaration of
11 William Waid before you prepared the analyses which
12 are in Schedules 4.0 through Schedule 7.1; isn't
13 that right?
14 **A. That's correct.**
15 **Q.** And the chart that Mr. Waid prepared
16 on page 4 is awfully similar to the charts that you
17 prepared, isn't it?
18 **A. Well, there's one table in here and I**
19 **have a number of schedules. So I wouldn't say**
20 **they're --**
21 **Q.** Right. But you've read the
22 declaration, and you understand how Mr. Waid
23 describes how you go about determining lost license
24 fees based on an annualized application approach,
25 correct?

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1 **A. That's correct.**
2 **Q.** And that is the approach that you
3 used, correct?
4 **A. That is the approach that I adopted**
5 **as -- in my determination of appropriate and**
6 **applicable damages after my review of the**
7 **information and data in this case.**
8 **Q.** And did you consider any other
9 approaches or did you do what Mr. Waid dictated?
10 **A. I considered other approaches, but**
11 **based upon the facts and circumstances and the**
12 **termination of the license, the failed negotiations**
13 **of the parties and that this license is essentially**
14 **a bridge or gap-fill for Federal to move from one**
15 **software solution to another, that was the**
16 **determination I made.**
17 **Q.** So you don't recall having reviewed
18 all the other software license that FICO has
19 entered into involving Blaze; is that right?
20 **A. I believe I spoke about the ones that**
21 **I remember reviewing, correct.**
22 **Q.** On how many other occasions has FICO
23 ever had a software license agreement based on
24 using annualized prices for 15 applications?
25 **A. I don't recall.**

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1 commercially reasonable software price?
2 **A. I guess I'll restate my answer, which**
3 **is I've provided what is my opinion as to the**
4 **reasonable damages related to the lost license fees**
5 **based upon the pricing of the Blaze Advisor by FICO.**
6 Q. Well, is it your opinion that the
7 damages numbers that you have provided for lost
8 license fees, that those are, in fact, commercially
9 reasonable software prices?
10 **A. I would need you to define what you**
11 **mean by commercially reasonable. I find them to be**
12 **reasonable as the appropriate damages based upon**
13 **the information available and the pricing as**
14 **FICO -- the pricing FICO uses for its Blaze Advisor**
15 **product.**
16 Q. Well, you're not an expert on software
17 pricing, correct?
18 **A. I have expertise in working on cases**
19 **that include software pricing, but I am not an**
20 **expert on the pricing of or the setting of prices**
21 **of software.**
22 Q. So if you're not an expert on software
23 pricing, you would not be -- you would not have
24 expertise in the area of determining whether a
25 particular price for a software license agreement

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1 is or is not a commercially reasonable software
2 price, correct?
3 **A. Well, I'm not sure that's fair. In my**
4 **experience in working with software agreements in**
5 **cases related to software has allowed me to review**
6 **lots and lots of agreements related to the pricing**
7 **of software.**
8 **In this case, I found it reasonable**
9 **that the pricing used by FICO has been used for**
10 **more than 15 years, and I've used that pricing in**
11 **the determination of damages in this case based**
12 **upon the facts and circumstances.**
13 Q. And I'm really asking a different
14 question. I'm wondering whether you are putting
15 yourself out here in this case as an expert on what
16 would be a commercially reasonable price for a
17 software license agreement or not?
18 **A. I have determined damages based upon**
19 **the lost license fees. In terms of am I offering**
20 **myself as an expert for the -- pricing the MSRP,**
21 **let's say, of a software product, I am not offering**
22 **expertise in that regard.**
23 Q. How many times have you spoken with
24 Mr. Whitener?
25 **A. I believe I spoke with Mr. Whitener**

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1 **two or three times.**
2 Q. And how long were these conversations?
3 **A. I don't recall, but they would likely**
4 **be somewhere between 30 and 60 minutes.**
5 Q. How many times did you speak with
6 Mr. Waid?
7 **A. Um, I believe I spoke with Mr. Waid**
8 **two times.**
9 Q. And how long were those conversations?
10 **A. Those would probably be a little on**
11 **the long -- I think longer, I would say probably 45**
12 **to 60 minutes.**
13 Q. Did you discuss anything in either of
14 those conversations -- in any of those conversations
15 with Mr. Whitener or Mr. Waid that did not make it
16 into your report?
17 **A. I think the opinions I've rendered**
18 **include what I learned from both of them during**
19 **those phone calls. I did not provide a -- you**
20 **know, a summary and -- and notes, as I don't take**
21 **notes related to those calls, in my report. But my**
22 **opinions reflect what I learned from those**
23 **individuals during those calls.**
24 Q. That the report reflects that, did you
25 say?

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1 **A. My report opinions.**
2 Q. Were you an expert witness in the case
3 titled Positron Systems, Inc. versus Wyle (phonetic
4 While) Laboratories, Inc.?
5 **A. Uh, yes, I was. It's Wyle (phonetic**
6 **Wy-lee), is how you pronounce the --**
7 Q. W-Y-L-E is pronounced Wyle?
8 **A. Yes.**
9 Q. And who were you retained by, what
10 side?
11 **A. I was retained by the plaintiff,**
12 **Positron. I was retained by counsel for Positron.**
13 **I was retained by counsel on behalf of Positron,**
14 **and the law firm was Caldwell Leslie, who was**
15 **subsequently acquired by Boies Schiller.**
16 Q. And in your expert report, did you
17 make a calculation related to the parties' profits?
18 **A. I'm just trying to remember the facts**
19 **and circumstances of that case. I believe I -- I**
20 **did perform a analysis related to the lost profits**
21 **of Positron, actually of both entities, because**
22 **they were partners in a contract with the U.S.**
23 **Government.**
24 Q. Do you recall in general terms what
25 was your expert testimony in that case -- or your

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1 expert opinion, I should say?
2 **A. My expert opinion related to the lost**
3 **profit that would have been earned on these products**
4 **had they been commercialized.**
5 Q. And what were the products?
6 **A. The products were very large x-ray**
7 **machines, in simple terms, used for detecting**
8 **corrosion on aircraft in the military, and actually**
9 **could be used for commercial applications as well.**
10 Q. And in your report, did you rely on
11 numbers from another expert?
12 **A. I don't recall.**
13 Q. Are you familiar with a Mr. Ditchey?
14 **A. Oh, yes.**
15 Q. Who is he?
16 **A. Mr. Ditchey was an airline expert or**
17 **an expert with significant expertise in the airline**
18 **industry and, also, with government contracts and**
19 **military contracts.**
20 Q. And in your report, did you rely on
21 his report that provided projections relating to
22 sales?
23 **A. Yes, given his expertise and**
24 **understanding of the market related to how this**
25 **product could be applied and the applications for**

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1 **which it could be applied to both in the military**
2 **and for commercial applications, I utilized his**
3 **expertise for those metrics.**
4 Q. Did the court in that case exclude
5 your testimony?
6 **A. The court excluded Mr. Ditchey's**
7 **testimony, and as a result, because his testimony**
8 **was stricken, I was unable to render an opinion as**
9 **to lost profits.**
10 Q. So when I asked you earlier today
11 whether your testimony had ever been excluded, why
12 didn't you relate the circumstances of this
13 Positron case?
14 **A. Frankly, I forgot that that transpired,**
15 **because when we went to trial, which happened**
16 **many -- a year or two after, I testified to the**
17 **opinions I could testify to. But, also, it was**
18 **Mr. Ditchey's opinions that were stricken, and**
19 **because I relied upon his opinions, I was unable to**
20 **testify to those opinions related to lost profits.**
21 Q. Well, your -- the Court actually
22 granted Wyle's motion to exclude your expert
23 opinion, correct?
24 **A. Based upon the fact that Mr. Ditchey's**
25 **opinions were stricken.**

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1 Q. In response to my question, the Court
2 ruled that your testimony should be excluded,
3 right?
4 **A. Based upon that motion, which related**
5 **to striking Mr. Ditchey's testimony, that's correct.**
6 Q. So you're not disagreeing that the
7 Court did that, are you, or are you?
8 **A. No, I'm not.**
9 Q. Okay. So, when I asked you earlier
10 today whether your testimony had ever been excluded
11 and you answered no, that wasn't accurate, was it?
12 **A. It was accurate at that time to the**
13 **best of my knowledge. But I also consider that**
14 **testimony, as you characterized it as being**
15 **stricken, as it was inputs that were relying upon**
16 **another expert whose opinions were stricken and**
17 **that results in my opinion also being excluded.**
18 Q. So let's -- let's be clear.
19 When you testified earlier in response
20 to my question as to whether your testimony as an
21 expert had ever been excluded and you said no, that
22 wasn't accurate?
23 **A. It wasn't accurate based on the way**
24 **you're characterizing it. But the methodology I**
25 **employed wasn't stricken, it was excluded because**

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1 **of the fact that Mr. Ditchey's opinion was**
2 **excluded.**
3 Q. But you're not denying that it was
4 excluded by the Court in response to a motion to
5 exclude your testimony, are you?
6 **A. No, I'm not.**
7 Q. Okay. And you're saying you forgot
8 about it. But this was as recently as June 2018
9 when that order was issued, right?
10 **A. I don't recall the timing.**
11 Q. Well --
12 **A. If you want to provide it, that's**
13 **fine. I move from case to case very quickly.**
14 MR. FLEMING: Will you mark this as
15 the next exhibit?
16 THE REPORTER: That's 459.
17 (Whereupon, Deposition Exhibit No. 459
18 was marked for identification, and a copy is
19 attached and hereby made a part of this deposition.)
20 BY MR. FLEMING:
21 Q. Showing you what's been marked as
22 Exhibit 459, is that the Order from the Court
23 excluding your testimony?
24 **A. It looks to be a copy of it, yes.**
25 Q. And was this in June 2018?

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1 A. It is.
2 Thank you for refreshing my memory. I
3 was always taught that a deposition isn't a memory
4 test.
5 Q. I'm sorry, you just said?
6 A. I said I was always taught that a
7 deposition wasn't a memory test. So thank you for
8 refreshing my memory.
9 Q. So I would have thought as somebody
10 who makes a living as an expert witness that it
11 would be pretty easy to remember whether your
12 testimony has ever been excluded or not. But
13 you're telling me you just forgot about it, right?
14 A. And I also stated that the way it's
15 characterizing -- and you can read it in the Order,
16 "is that Zoltowski is excluded, but if plaintiff
17 convinces the Court that Ditchey should not be
18 excluded she will consider Zoltowski."
19 So, again, it was contingent on
20 Mr. Ditchey's opinion as to why I was excluded, not
21 on my methodology that was employed.
22 Q. So how many other times has your
23 testimony been excluded?
24 A. This is the only one that I can
25 recall, now that you've refreshed my memory.

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1 Q. So -- just so that I'm clear, that
2 wouldn't be -- whether you've been excluded in
3 another case wouldn't be something of such
4 significance that you would immed -- it would
5 immediately come to mind to you, right?
6 A. If my methodology that was employed
7 was found by the Court to be unsound, then, yes.
8 But my methodology was not ruled by the Court to be
9 unsound, it was that the inputs I used for that
10 methodology could not be used.
11 Q. So it may be that there's other cases
12 where your testimony has been excluded but you just
13 don't remember it today, right?
14 A. I don't believe so.
15 Q. All right. Now, you also testified as
16 an expert in the case entitled Shepard Fairey
17 versus Associated Press?
18 A. I did.
19 Q. And that was a copyright infringement
20 case?
21 A. Correct.
22 Q. And in that case you testified that a
23 license fee generated by Getty Images' automated
24 online system for isolated uses of certain Getty
25 photographs was a proper measure of the Associated

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1 Press's actual damages; is that correct?
2 A. I believe that's correct.
3 Q. So in that case did you -- how did you
4 go about determining the damages?
5 A. I was brought into opine as to the
6 appropriate license fee that should have been paid
7 for use of that image, and my recollection is I
8 used the standard pricing that was used by the AP
9 in licensing its images and based upon the type of
10 usage and the volume of usage.
11 Q. And how did you obtain that
12 information?
13 A. I believe that information was either
14 publicly available or produced in that proceeding
15 or both.
16 Q. And did you offer any testimony in
17 that case as to why your determination of the lost
18 profits was the appropriate measure for the
19 Associated Press's actual damages?
20 A. Could you repeat that question?
21 Q. Did you ever provide testimony or
22 information in your expert report as to why the
23 lost profits as you determined it was the
24 appropriate measure for determining the actual
25 damages -- I'm sorry, the lost license fees, I

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1 should say, not the lost profits?
2 A. I don't recall what my report stated,
3 but I rendered an opinion that was related to what
4 I believed to be the appropriate lost license fees
5 based upon the information and data and facts and
6 circumstances in that case.
7 Q. And am I correct that you determined
8 the lost license fees by simply going online and
9 getting the pricing from Getty Images' automated
10 online system?
11 A. As I stated, I don't recall if it was
12 publicly available or produced in the matter or
13 both. But it was based upon their standing --
14 standard pricing for use of images for various uses
15 and, then, the volume of those uses.
16 Q. Now, just to go back for a second, is
17 it your position that a negotiation framework that
18 we talked about earlier is not relevant if it is
19 not a patent case?
20 A. It's my opinion that the negotiation --
21 hypothetical negotiation framework isn't appropriate
22 in this particular case and that it's typically
23 used when terminating a reasonable royalty in a
24 patent infringement case as it relates to damages.
25 Q. And that's based on the case

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1 A. That's correct, typically in a patent
2 infringement damages context.
3 Q. But not limited to patent cases, right?
4 A. I believe I have rendered opinions
5 related to a royalty in other IP cases. I don't
6 recall if the construct was the same, including a
7 willing licensor and a licensee. It may have
8 included a hypothetical negotiation construct, but
9 I don't think the requirement that the parties need
10 to come to a conclusion or come to an agreement may
11 have been part of each of those analyses.
12 Q. What do you mean by the phrase
13 reasonable royalty?
14 A. It would be -- a royalty would be the
15 amount of money paid for use of -- in the context
16 of intellectual property, use of that intellectual
17 property. A reasonable royalty is terminology, I
18 believe, from case law. But reasonable is, I
19 believe, supposed to mean that it is reasonable in
20 nature in terms of the price being paid and the
21 structure of it in terms of the license.
22 Q. Now, in this case, you've stated that
23 a measure similar to reasonable royalties is an
24 inappropriate measure of damages in this case,
25 correct?

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1 A. I -- I don't recall exactly the
2 terminology I used, but I believe I was stating in
3 response to Mr. Bakewell's opinion that the
4 hypothetical negoti -- negotiation construct, which
5 is used typically in patent damages to determine
6 the appropriate reasonable royalty, is not
7 applicable and appropriate in this instance.
8 Q. And you would say that the
9 hypothetical negotiation framework is similar to
10 the -- is a damage measure similar to reasonable
11 royalties?
12 A. The hypothetical negotiations is -- is
13 a framework or construct that can be used to
14 determine a reasonable royalty.
15 Q. And is it your opinion in that case
16 that a measure similar to reasonable royalties is
17 an inappropriate measure of damages in this case?
18 A. My opinion is that based upon the
19 information available and the facts and circumstances
20 that using a hypothetical negotiation framework is
21 inappropriate, and especially in regards to
22 Mr. Bakewell's opinion, which seems to disregard
23 the fact that the parties did enter negotiations
24 and failed to reach an agreement, and that's my
25 disagreement.

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1 Q. So, in response to my question, is it
2 your opinion in this case that a measure similar to
3 reasonable royalties is an inappropriate measure of
4 damages in this case?
5 A. I'm having a hard time answering the
6 question only because when you think of license
7 fees one could analogize license fees in this
8 instance to a royalty, and, therefore, my
9 determination of the actual damages could -- if one
10 wanted to try to categorize it as a royalty, could
11 maybe do that. But my opinion is -- as to the lost
12 license fees is based upon the construct I've laid
13 out in my report.

14 Q. So in response to my question, are you
15 saying that using a measure similar to reasonable
16 royalties is or is not an appropriate measure of
17 damages in this case?

18 A. Well, I think the terminology is
19 making it confusing, because my disagreement is
20 using a hypothetical negotiation construct is
21 inappropriate.

22 Q. Will you look to paragraph 55 of your
23 rebuttal report?

24 A. Do you mean my reply report?

25 Q. Your reply.

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1 A. And you said which paragraph? I'm
2 sorry.

3 Q. Fifty-five.

4 A. Okay.

5 Q. So are you stating in this paragraph
6 that it's inappropriate in this case to use a
7 measure of damages based on a reasonable royalty?

8 A. This relates to an opinion that says
9 Mr. Bakewell incorrectly used the hypothetical
10 negotiation framework, and that negotiation
11 framework is commonly used in patent infringement
12 damages quantification.

13 Q. So are you stating in that paragraph,
14 or not, that using a measure similar to reasonable
15 royalties is an inappropriate measure of damages in
16 this case?

17 A. I think I answered that before. My
18 opinion is that a hypothetical negotiation framework
19 isn't appropriate to apply in this case. As I
20 stated, I -- I just feel uncomfortable saying it's
21 a royalty, that's not specifically applicable here
22 because, as I stated, I'm quantifying lost license
23 fees, and someone could characterize those license
24 fees as royalties. But with that caveat, yes.

25 Q. Okay. Now, early in your report,

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1 paragraphs -- your initial report, paragraph 30 to
2 50 you write an opinion about the single economic
3 unit; is that right?
4 **A. Which paragraph?**
5 **Q.** I think it's beginning of paragraph
6 30?
7 **A. Okay.**
8 **Q.** Now, have you ever provided an opinion
9 relating to, quote, single economic unit, unquote,
10 before?
11 **A. Not in these specific terms. I have**
12 **rendered opinions related to the companies and**
13 **their -- and their constructs per se in terms of**
14 **damages and -- applicable damages to the companies**
15 **involved, but not under the terminology of a single**
16 **economic unit.**
17 **Q.** Where did that terminology come from,
18 that phrase single economic unit, is it -- is it
19 from a case or legal precedent?
20 **A. I don't recall. It may be from a**
21 **specific case that may have included that type of**
22 **terminology.**
23 **Q.** Why don't you cite the case?
24 **A. It may have just been -- may have just**
25 **been overlooked if that's the case. I just don't**

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1 **recall.**
2 **Q.** You don't actually recall that it
3 comes from a case, do you?
4 **A. I don't recall.**
5 **Q.** Okay. So it may not have been cited
6 because it isn't based on a case?
7 **A. As I stated, I don't recall. It may**
8 **have been.**
9 **Q.** Okay. I mean, is there any other
10 expert or scholar or any other person that you are
11 aware of who have written on this concept of,
12 quote, single economic unit, unquote?
13 **A. I don't know.**
14 **Q.** So did you create that concept out of
15 thin air for the first time for this case?
16 **A. I don't think it's a concept. Maybe**
17 **the terminology that's used, the single economic**
18 **unit might be a novel terminology, but the -- the**
19 **actual discussion and the relationship between the**
20 **parties in terms of their corporate structure and**
21 **the benefits received by each of those entities**
22 **under the, you know, umbrella as defined in this**
23 **write-up, I don't think that type of -- that type**
24 **of write-up or analysis is -- is novel. Just the**
25 **language of a single economic unit may be something**

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1 **that has not been used before.**
2 **Q.** I mean, have you seen it in any
3 publication or journal or book or any other writing?
4 **A. I don't recall if I have or have not.**
5 **Q.** Have you ever testified as to that
6 concept, quote, single economic unit, unquote,
7 before?
8 **A. I have not in those terms.**
9 **Q.** Do you know of anybody who has?
10 **A. I don't know.**
11 **Q.** Do you think it's strange that you're
12 referring to this concept that has never, to your
13 knowledge, appeared before in any case or
14 publication?
15 **A. No.**
16 **Q.** Why not?
17 **A. Because there's always new concepts**
18 **being created. I don't find that it's never been**
19 **discussed in these terms, as a single economic**
20 **unit, to be problematic.**
21 **Q.** So what are the -- what do you
22 consider to be the consequences for purposes of
23 your expert opinion as to whether or not defendants,
24 the corresponding subsidiaries of both and the
25 related Chubb entities, all of whom are

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1 subsidiaries of an ultimate parent Chubb Limited,
2 are a, quote, single economic unit, unquote?
3 **THE WITNESS:** Could you read that back
4 to me, please?
5 **(Whereupon, the court reporter read**
6 **back the following question: "What do you consider**
7 **to be the consequences for purposes of your expert**
8 **opinion as to whether or not defendants,**
9 **the corresponding subsidiaries of both and the**
10 **related Chubb entities, all of whom are**
11 **subsidiaries of an ultimate parent Chubb Limited,**
12 **are a, quote, single economic unit, unquote?")**
13 **THE WITNESS:** I'm not sure I
14 understand what you mean by the consequences.
15 **BY MR. FLEMING:**
16 **Q.** What does it matter for purposes of
17 your expert opinion? You spent a lot of time
18 talking about it and supporting it, and I am
19 inquiring what does it matter, what is the
20 consequence for purposes of your report as to
21 whether all those entities are considered a single
22 economic unit or not?
23 **A. My understanding is that ultimately**
24 **this will be a legal question determined by the**
25 **trier of fact, but it relates to which entities**

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1 would be responsible or required to pay damages as
2 it relates to the unauthorized use of the software
3 and the allegations as such under the causative
4 action.

5 Q. Are you saying that if these entities
6 are not considered a single economic unit, for
7 example, the defendants may not be liable for any
8 damages caused by the writing companies, for
9 example?

10 A. Again, I -- this is a legal question
11 for the trier of fact. I've simply looked at this
12 from an economic perspective, that all of these
13 entities are related in their reporting and
14 reporting requirements and their choice to do so,
15 and at the end of the day this will be a legal
16 determination by the trier of fact as to which
17 entities are liable for damages.

18 Q. And tell me specifically, what do you
19 mean that the consequence would go to the issue of
20 what entities are required to pay damages?

21 A. Again, this is a legal issue related
22 to which parties would be required to pay damages.
23 But the question I think you're asking -- I'm going
24 to try to answer it as best I can.

25 I understand that the defendants, the Page 95

1 named defendants are Federal Insurance Company and
2 ACE America Insurance Company, and as a result of
3 that -- those circumstances, the question becomes,
4 if those entities are found to be liable, which of
5 the entities which fall under their corporate
6 structure would be included in that damages
7 quantification, and as I stated, I'm simply
8 providing information to arm a trier of fact with
9 an understanding of the construct or corporate
10 structure from an economic perspective to assist in
11 that determination.

12 Q. Okay. So did somebody ask you to
13 address this issue of single economic unit so that
14 this legal issue could be addressed in the future?

15 A. It was a discussion we had with
16 counsel because we had a question as to the
17 defendants who were named were, obviously, these
18 two entities, Federal and ACE, and there are a
19 number of entities based upon their corporate
20 structure which, obviously, did not include that
21 name, and we wanted to understand that corporate
22 structure and made a determination that in order to
23 explain it appropriately from an economic
24 perspective that there was a relationship between
25 all these parties that it was -- it made sense to Page 96

1 include a section like this in this report.

2 Q. I see. So was it your idea to include
3 this section about single economic unit?

4 A. I'm not sure whose idea it was. It
5 was a discussion we had with counsel, and we
6 brought it up that there was this issue that we
7 from a damages perspective wanted to make sure we
8 understood.

9 Q. So let me see if I understand it.
10 If instead of Federal and ACE as the
11 named parties this case had been brought against
12 all of the subsidiaries who are named and all of
13 the writing companies and everybody who you
14 mentioned in your report, if they were all as named
15 defendants, you would not have raised this concern;
16 is that fair?

17 A. I don't know the answer to that
18 question because, again, it's a legal determination
19 related to who would be liable for the damages.
20 But assuming that all of those who are named
21 parties and could be named defendants and it was
22 found that each of them was liable for unauthorized
23 use, then, I may not have needed to include a
24 section like this.

25 Q. Okay. So you're -- and you're the one Page 97

1 who raised the issue in the first instance, or you
2 and your team?

3 A. Well, we raised the issue of
4 understanding the fact that there were two named
5 defendants and there were a number of other
6 entities that were un -- had unauthorized use of
7 the software.

8 Q. Okay. So, in response to that
9 concern, you then created this concept of a, quote,
10 single economic unit, unquote; is that fair?

11 A. Yes, through our discussions with
12 counsel and realizing that this would be helpful
13 information to arm a trier of fact with, yes, we
14 determined that this should be included in the
15 report.

16 Q. So did you have any concerns in doing
17 that that there was no prior precedent or legal or
18 scholarly basis for creating this concept of,
19 quote, single economic unit, unquote, or was that
20 not a concern?

21 A. It was not a concern in that I am
22 providing information from an economic perspective
23 regarding the corporate structure of the
24 defendants.

25 Q. Okay. And just to be clear, you say Page 98

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<p>1 from an economic perspective, you can't point me to</p> <p>2 any economic publications or any economic journals</p> <p>3 or any books by persons versed in economics that</p> <p>4 adopt or espouse or address this concept of, quote,</p> <p>5 single economic unit, unquote, correct?</p> <p>6 A. In those particular terms of a single</p> <p>7 economic unit, I'm not aware of anything. But the</p> <p>8 concept of corporate structure is not one that's --</p> <p>9 that economists and others have not addressed</p> <p>10 before.</p> <p>11 Q. That who has not addressed before?</p> <p>12 A. Economists and others, accountants,</p> <p>13 tax professionals.</p> <p>14 Q. You're saying they've addressed the</p> <p>15 structure of companies before?</p> <p>16 A. And I discussed some of that.</p> <p>17 Q. All right. So you go on to say that</p> <p>18 there's four different criteria or bases for</p> <p>19 determining whether there's a single economic unit;</p> <p>20 is that right?</p> <p>21 A. Is there a particular spot in my</p> <p>22 report you're pointing to?</p> <p>23 Q. Well, starting on page 10,</p> <p>24 paragraph 30, there's a section of your report</p> <p>25 entitled A Single Economic Unit, right?</p> <p>Page 99</p>	<p>1 A. I wouldn't say I set out with</p> <p>2 criteria. I -- they may have become the factors,</p> <p>3 but they're the information that after our</p> <p>4 assessment supported that this was, in fact, a</p> <p>5 single economic unit from a corporate structure</p> <p>6 perspective.</p> <p>7 Q. So you're saying they're not criteria,</p> <p>8 but they might become the factors, is that what</p> <p>9 you're saying?</p> <p>10 A. Well, I think you -- the way your</p> <p>11 question is asked it makes it seem as though there</p> <p>12 were criteria that I started with a framework, and</p> <p>13 what I did was I looked at the information</p> <p>14 available and determined that this was the</p> <p>15 supporting information based upon my review and</p> <p>16 analysis of that information.</p> <p>17 Q. Okay. So you created this concept of</p> <p>18 a single economic unit out of whole cloth, and then</p> <p>19 you determined different factors or criteria that</p> <p>20 may assist in that determination as to whether</p> <p>21 these entities are a single economic unit, correct?</p> <p>22 A. I'm not sure if it's fair to be</p> <p>23 characterized that way. I think there were certain</p> <p>24 inputs to look into related to that single economic</p> <p>25 unit methodology, and I summarize those here, which</p> <p>Page 101</p>
<p>1 A. That's correct.</p> <p>2 Q. And, then, you have underneath that</p> <p>3 section of your report five different subsections</p> <p>4 entitled a) Consolidation of the Financial</p> <p>5 Statements, b) Parent and Subsidiary Relationships,</p> <p>6 c) Pooling arrangements; d) Consolidated Income Tax</p> <p>7 Returns, and e) Economic Benefits of Single</p> <p>8 Economic Unit, right?</p> <p>9 A. That's correct.</p> <p>10 Q. So when I read that, I assumed that</p> <p>11 those were the factors or criteria that you were</p> <p>12 relying upon to determine whether all of these</p> <p>13 entities could be considered a single economic</p> <p>14 unit. Am I correct?</p> <p>15 A. It's information that falls under each</p> <p>16 of these four categories that provides support</p> <p>17 of -- of the fact that this is a single economic</p> <p>18 unit based upon the corporate structure, and the</p> <p>19 fifth section is more of a conclusion related to</p> <p>20 that information that there is a benefit that flows</p> <p>21 to all these subsidiaries that fall under this</p> <p>22 corporate structure.</p> <p>23 Q. How did you -- So they are the factors</p> <p>24 or criteria that determine whether these entities</p> <p>25 are a single economic unit, correct?</p> <p>Page 100</p>	<p>1 would be the fact that they have a consolidation of</p> <p>2 their financial statements, from a tax perspective</p> <p>3 they're doing consolidated tax filings, that they</p> <p>4 enter into these pooling agreements where the</p> <p>5 members are all of their subsidiaries that are all</p> <p>6 related to this parent entity, and the fact that</p> <p>7 there are relationships between the parents and the</p> <p>8 subsidiaries in terms of being wholly owned or</p> <p>9 majority owned subsidiaries.</p> <p>10 Q. Okay. So you're comfortable calling</p> <p>11 them inputs, at least, you don't want to call them</p> <p>12 criteria or factors, but you're comfortable using</p> <p>13 the word input or inputs, right?</p> <p>14 A. And I'm not uncomfortable with the</p> <p>15 term criteria or factors. I just want to say I</p> <p>16 didn't start out with them as criteria, they</p> <p>17 just -- they became the criteria that led me to the</p> <p>18 conclusion.</p> <p>19 Q. Okay. Are they criteria today?</p> <p>20 A. If you want to term them that, I'm</p> <p>21 okay with that.</p> <p>22 Q. Okay. That took us a long time to get</p> <p>23 there.</p> <p>24 A. Sorry about that.</p> <p>25 Q. No, that's all right.</p> <p>Page 102</p>

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<p>1 pieces of information we learned through our review</p> <p>2 of the documents.</p> <p>3 Q. So if two companies contract to help</p> <p>4 each other, at what point do they become a single</p> <p>5 economic unit in your mind?</p> <p>6 A. I guess it would relate to the -- the</p> <p>7 structure of the corporation and their relationship.</p> <p>8 In this situation, they're wholly</p> <p>9 owned subsidiaries, pooling agreement and -- under</p> <p>10 this construct are entities that are related under</p> <p>11 one corporate structure between parent and</p> <p>12 subsidiary and where they accumulate dollars and</p> <p>13 allocate them based on proportion of their size in</p> <p>14 that pool.</p> <p>15 But I don't have information, like I</p> <p>16 stated it could be bank accounts, to understand</p> <p>17 that they all fall into one company. Are they</p> <p>18 sharing bank accounts, are they sharing the -- the</p> <p>19 profits from those bank accounts or the revenues</p> <p>20 from those bank accounts or the costs?</p> <p>21 Q. Do you know the answer to those</p> <p>22 questions with regard to these companies?</p> <p>23 A. That information wasn't produced in</p> <p>24 this proceeding.</p> <p>25 Q. Okay. Then your fourth input or</p> <p>Page 111</p>	<p>1 Q. Yes.</p> <p>2 A. I do not have a lot of experience in</p> <p>3 tax -- tax-related work.</p> <p>4 Q. So are you qualified to make</p> <p>5 assumptions based on the tax rules?</p> <p>6 A. Again, this is a educational exercise</p> <p>7 to provide information to the court and the trier</p> <p>8 of fact to make a determination on this issue.</p> <p>9 Q. I understand that, but my question is</p> <p>10 different.</p> <p>11 Are you qualified to make assumptions</p> <p>12 based on tax rules?</p> <p>13 A. I guess it would relate -- it would</p> <p>14 have to depend upon the assumption and what you're --</p> <p>15 what you mean by that. Again, this is simply</p> <p>16 information that I'm summarizing related to my</p> <p>17 understanding of the company's structure and the</p> <p>18 way that they file their taxes.</p> <p>19 Q. Are you qualified to provide an expert</p> <p>20 opinion on whether a corporation's choice to file</p> <p>21 in a consolidated manner is similar to the</p> <p>22 accounting reporting requirements promulgated by</p> <p>23 the FASB?</p> <p>24 A. I think, really, all that's stating is</p> <p>25 that the company is filing its tax returns in a</p> <p>Page 113</p>
<p>1 criteria, beginning on paragraph 47, is Consolidated</p> <p>2 Income Tax Returns - Post Acquisition; is that</p> <p>3 correct?</p> <p>4 A. That's correct.</p> <p>5 Q. And you say, you give the opinion</p> <p>6 that, quote, The choice to file in a consolidated</p> <p>7 manner is similar to the accounting reporting</p> <p>8 requirements promulgated by FASB, which suggests</p> <p>9 that a corporation and its legal entities are to be</p> <p>10 viewed in singularity, even if the corporation</p> <p>11 achieves its business objectives through multiple</p> <p>12 entities, unquote; is that right?</p> <p>13 A. That's correct.</p> <p>14 Q. Now, you're not providing an expert</p> <p>15 opinion on tax issues, right?</p> <p>16 A. Correct.</p> <p>17 Q. You're not an expert on tax issues?</p> <p>18 A. No, I'm not.</p> <p>19 Q. And you're not an expert on the</p> <p>20 application of tax rules, right?</p> <p>21 A. That's correct.</p> <p>22 Q. What is your experience with regard to</p> <p>23 tax issues?</p> <p>24 A. In regard to my professional</p> <p>25 experience?</p> <p>Page 112</p>	<p>1 consolidated manner, and, also, there are reporting</p> <p>2 requirements as promulgated by the FASB related to</p> <p>3 consolidated financial statements.</p> <p>4 Q. Right, and my question is different.</p> <p>5 My question is, are you qualified to</p> <p>6 provide an expert opinion on whether a corporation's</p> <p>7 choice to file in a consolidated manner is similar</p> <p>8 to the accounting reporting requirements</p> <p>9 promulgated by the Financial Accounting Standard</p> <p>10 Boards?</p> <p>11 A. I think that's more of an observation.</p> <p>12 I'm not providing expert opinion on if they're</p> <p>13 exactly the same, but that's my observation based</p> <p>14 upon my review and analysis of the information.</p> <p>15 Q. I understand it's your observation.</p> <p>16 My question is whether you are</p> <p>17 qualified to provide an expert opinion on whether a</p> <p>18 corporation's choice to file in a consolidated</p> <p>19 manner is similar to the accounting reporting</p> <p>20 requirements promulgated by the Financial</p> <p>21 Accounting Standards Board?</p> <p>22 A. I don't think that's for me to</p> <p>23 determine. It's usually the court that makes a</p> <p>24 determination on an expert's qualifications.</p> <p>25 Q. Well, do you think that you're</p> <p>Page 114</p>

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1 qualified?
2 **A. I do not have expertise in -- in**
3 **tax-related manner -- matters.**
4 **Q. Okay. So you would agree that you are**
5 **not qualified to provide an expert opinion on**
6 **whether a corporation's choice to file in a**
7 **consolidated manner is similar to the accounting**
8 **reporting requirements promulgated by the Financial**
9 **Accounting Standards Board?**
10 **A. And I'll answer that the same way I**
11 **did before, which is it's not an opinion that they**
12 **are the same, it's an observation that based upon**
13 **my review that they are -- it is similar.**
14 **Q. Again, and my question is different**
15 **than that, and I'd like an answer to it.**
16 **Do you agree that you are not**
17 **qualified to provide an expert opinion on whether a**
18 **corporation's choice to file in a consolidated**
19 **manner is similar to the accounting reporting**
20 **requirements promulgated by the FASB?**
21 **A. I don't know if I'm qualified or not.**
22 **I would state that I'm not providing an opinion.**
23 **It's simply an observation that I include in my**
24 **report.**

25 **Q. So your response is you don't know**

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1 whether you're qualified or not?
2 **A. Correct.**
3 **Q. You're certainly not stating that you**
4 **are qualified to provide such an opinion?**
5 **A. That's correct.**
6 **Q. So that would mean that you're not**
7 **qualified to provide such an opinion?**
8 **A. I'm not sure if that's an appropriate**
9 **characterization, but I think the prior question is**
10 **more appropriate, that I -- I don't know if I'm**
11 **qualified.**
12 **Q. Now, in your reply, paragraph 109,**
13 **that paragraph is entitled, quote, No Opinion**
14 **Regarding Writing Companies Subject to Damages,**
15 **unquote. So are you walking back from this whole**
16 **concept of a single economic unit?**
17 **A. I don't think I'm -- I think walking**
18 **back isn't a fair characterization. I think I**
19 **stated what the -- what the -- the meaning of the**
20 **exercise was and what I set out to do, which was**
21 **provide education to the court or trier of fact to**
22 **make a determination.**

23 **Q. So why did you feel the need to say**
24 **here, quote, No Opinion Regarding Writing Companies**
25 **Subject to Damages, unquote?**

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1 **A. Because it's not for me to decide if**
2 **the companies -- this goes back to legal question**
3 **as to who is responsible for damages. This would**
4 **be for the trier of fact, this would for the jury,**
5 **for the judge to determine.**
6 **I'm simply providing information**
7 **regarding the fact that the company operates as a**
8 **single economic unit, and based upon that information**
9 **and other information, which the jury or judge**
10 **decides to utilize, will make a determination as to**
11 **which entities are subject to damages should**
12 **liability be found.**
13 **Q. I thought your purpose in this entire**
14 **exercise that you engaged in in your expert report**
15 **as to whether all of these various entities are a**
16 **single economic unit was to support the idea that**
17 **all of these various units, including the writing**
18 **companies, are subject to damages?**
19 **A. The purpose of the exercise was to**
20 **educate the Court as to what the corporate**
21 **structure looks like for the entities involved in**
22 **this proceeding, but I don't have a legal opinion**
23 **as to which ones are subject to damages.**
24 **Q. So why -- why did you feel the need in**
25 **your reply report to state that, that you have,**

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1 quote, No Opinion Regarding Writing Companies
2 Subject to Damages, unquote?
3 **A. I believe this was just a rebuttal**
4 **point back to Mr. Bakewell because, if I remember**
5 **correctly, he may have just mischaracterized what I**
6 **was rendering as my opinions.**
7 **Q. All right. You agree that you did not**
8 **do any independent research to confirm whether or**
9 **how each application incorporates Blaze into its**
10 **overall structure?**
11 **A. Other than review of information in**
12 **this proceeding that was submitted in interrogatory**
13 **responses or deposition testimony, other documents**
14 **provided, there was no additional analysis outside**
15 **of that.**
16 **Q. Okay. Now, you reference in your**
17 **analysis a number of applications where you have**
18 **seen that Federal states that certain of those**
19 **applications do not use Blaze, correct?**
20 **A. Is there a particular place you're**
21 **pointing me to in my report?**
22 **Q. You're not aware of that generally? I**
23 **will go to your report. But you're not aware of**
24 **that generally?**
25 **A. Could you repeat the question, please?**

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1 Q. Your analysis refers to a number of
2 applications that use Blaze, and Federal has
3 responded that a number of those applications do
4 not use Blaze. You're aware of that generally,
5 right?
6 **A. I am aware that there has been**
7 **information that Federal -- or Federal has stated**
8 **that certain applications in my analysis do not use**
9 **Blaze. However, I understand that in their**
10 **interrogatory responses there was information that**
11 **the company provided related to the revenues which**
12 **came from those applications and used Blaze Advisor.**
13 Q. Now, in paragraph 88 of your reply,
14 you say in the last sentence, quote, If Plaintiff
15 is unable to demonstrate that certain of the
16 applications infringe FICO's copyrights through the
17 use of the Blaze Advisor software, I may adjust my
18 analysis to the extent necessary, unquote.
19 **A. I see that.**
20 Q. So tell me, I mean, if it is determined
21 by a fact-finder that certain of the applications
22 that are contained in your analysis do not use
23 Blaze, I mean, you would adjust your analysis,
24 right, it's not that you may adjust your analysis
25 to the extent necessary, you would adjust it?

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1 **A. If I was asked or required to do so, I**
2 **would adjust it, yes.**
3 Q. Even if you're not asked or required
4 to do it, if it's determined that your analysis is
5 based in part on applications that use Blaze but
6 it's determined that they do not use Blaze, you
7 would revise your analysis, right?
8 **A. Sure.**
9 Q. Okay.
10 **A. I mean, I also -- I may not need to**
11 **because it may happen through trial. And so,**
12 **therefore, that's why I have schedules that allow a**
13 **trier of fact to pull out certain applications if**
14 **it's found that they're not found to be infringing.**
15 Q. Okay, okay. Let's look at sections
16 101 to 108.
17 **A. Paragraph 101?**
18 Q. In your initial report. Sorry about
19 that.
20 **A. Okay.**
21 Q. Thanks for asking the clarification.
22 **A. Okay.**
23 Q. And this describes, in part, your
24 opinions on the pricing for Blaze; is that right?
25 **A. Correct.**

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1 Q. And you state, quote, the process by
2 which FICO prices Blaze Advisor has not changed
3 since November 2003, unquote?
4 **A. Correct.**
5 Q. Now, you've read Bill Waid's
6 deposition where he talks about a number of changes
7 that have occurred since 2003 that are not on that
8 pricing grid, right?
9 **A. I don't recall. If there were**
10 **changes, they were not significant in terms of**
11 **changing the structure and the -- and the process**
12 **of the pricing.**
13 Q. So the 2006 agreement between FICO and
14 Federal was an enterprise agreement, right?
15 **A. It became an enterprise agreement I**
16 **believe through the second amendment of that**
17 **agreement.**
18 Q. So if the pricing structure has been
19 in place since 2003 and you relied upon it for your
20 calculation, why didn't you arrive at an enterprise
21 license as well?
22 **A. I think I stated this previously, but**
23 **the facts and circumstances demonstrate that that**
24 **wouldn't be an appropriate structure. You have a**
25 **situation where two parties are -- entered into**

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1 **negotiations to renegotiate the license after the**
2 **merger that transpired by the plaintiffs -- I mean,**
3 **sorry, by the defendants, and they were unable to**
4 **reach an agreement, and as a result you have two**
5 **parties that -- well, you have one party that's**
6 **un -- is using the soft -- software without**
7 **authorization and you have two parties that are**
8 **not -- are at -- at that point adversarial and not**
9 **looking to create a long-term relationship. And,**
10 **effectively, the enterprise-wide license pricing in**
11 **that type of structure really lends itself to --**
12 **for FICO, two parties that they're going to have as**
13 **customers long term.**
14 Q. If you had used a perpetual license
15 rather than an application-based approach, what
16 would be the lost license fees in your analysis?
17 **A. I'd have to go back and recalculate my**
18 **analysis, with the caveat that I don't agree that**
19 **that's the appropriate structure.**
20 Q. Well, for example, let's look at the
21 domestic named application fees, Schedule 6.0. If
22 you were determining lost license fees based on a
23 perpetual license, wouldn't the lost license fees
24 be depicted in the first column of Schedule 6.0,
25 totaling 7.9 million, approximately?

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<p>1 A. The license fees, that's correct.</p> <p>2 Q. Similarly, for the afore-named</p> <p>3 application license fees, going to Schedule 7.0, if</p> <p>4 you had determined the lost license fees based on a</p> <p>5 perpetual license rather than an application-based</p> <p>6 approach, the total damages would be, again, listed</p> <p>7 in the first column and amount to approximately</p> <p>8 \$6 million; is that right?</p> <p>9 A. That's under the assumption that</p> <p>10 that's the appropriate construct and that no other</p> <p>11 license fees would be applicable.</p> <p>12 Q. But, otherwise, that would be the --</p> <p>13 the place to look at in your analysis and the</p> <p>14 number \$6 million --</p> <p>15 A. For the --</p> <p>16 Q. -- would be --</p> <p>17 A. -- deployment and development seat</p> <p>18 license fee.</p> <p>19 The one thing I would note with these</p> <p>20 schedules is when looking at it from an enterprise</p> <p>21 license agreement perspective is these don't --</p> <p>22 this analysis doesn't consider the long-term</p> <p>23 relationship that FICO builds with its customers</p> <p>24 and, therefore, doesn't include any assessment of</p> <p>25 the professional fees that would go along with a</p> <p style="text-align: right;">Page 123</p>	<p>1 discount was generally 40 percent, right?</p> <p>2 A. I don't know if the standard is</p> <p>3 40 percent. I remember seeing discounts up to</p> <p>4 40 percent, and, as I stated, that's with the</p> <p>5 expectation of professional service fees.</p> <p>6 And that's different than the contract</p> <p>7 we have here, where FICO had no expectation of</p> <p>8 professional service fees because Federal or</p> <p>9 plaintiff -- sorry, defendants had stated that they</p> <p>10 were going to move forward without any sort of</p> <p>11 input or use of those professional services going</p> <p>12 forward for FICO.</p> <p>13 Q. So your -- your framework for</p> <p>14 determining lost license fees is based on an</p> <p>15 assumption that there should not be any discount;</p> <p>16 is that right?</p> <p>17 A. That's correct, based upon a named</p> <p>18 application license, and these facts and</p> <p>19 circumstances.</p> <p>20 Q. And, in any event, you agree that</p> <p>21 there is no discount reflected in your analysis</p> <p>22 related to lost license fees, right?</p> <p>23 A. That's correct, and, also, no</p> <p>24 professional service fees as well.</p> <p>25 Q. So if there was a -- if you had used a</p> <p style="text-align: right;">Page 125</p>
<p>1 license like this, which I understand to be a</p> <p>2 significant part of FICO's business.</p> <p>3 Q. Now, with regard to FICO's prior</p> <p>4 software license agreements involving Blaze, what</p> <p>5 is the range of discounts that they have provided</p> <p>6 to their customers?</p> <p>7 A. I think it depends upon the agreement.</p> <p>8 Q. Well, that's why I'm asking what is</p> <p>9 the range? That is my question.</p> <p>10 A. I believe they have provided discounts</p> <p>11 up to -- and, again, I don't recall specifically</p> <p>12 the number, but I think it might be around</p> <p>13 40 percent, again, with the caveat that the reason</p> <p>14 for the discount that FICO provides is from the</p> <p>15 perspective of building a long-term relationship</p> <p>16 with customers and the expectation of professional</p> <p>17 service fees that come along with that agreement.</p> <p>18 Q. And did you come across any license</p> <p>19 fee between Chubb -- excuse me, between FICO and a</p> <p>20 customer involving Blaze where a li -- where a</p> <p>21 discount was not provided?</p> <p>22 A. I don't recall.</p> <p>23 Q. You don't recall one way or another?</p> <p>24 A. I don't.</p> <p>25 Q. But you'd agree that their standard</p> <p style="text-align: right;">Page 124</p>	<p>1 perpetual license fee as the basis for your</p> <p>2 analysis rather than the application fee and you</p> <p>3 had provided a 40 percent discount, what would be</p> <p>4 the total lost license fees?</p> <p>5 A. And just so I'm clear with your</p> <p>6 question, a 40 percent discount just on the</p> <p>7 deployment and development seat?</p> <p>8 Q. Yes.</p> <p>9 A. For domestic named applications, if</p> <p>10 you looked at a perpetual license for deployment</p> <p>11 and development seats, that totals 7.9 million, and</p> <p>12 if you discounted it by 40 percent, it would</p> <p>13 reduced by slightly more than \$3 million.</p> <p>14 If you did the same for foreign named</p> <p>15 applications, the perpetual license, which is only</p> <p>16 deployment and development seat license fees, is a</p> <p>17 little more than 6 million. If you had a 40 percent</p> <p>18 discount, that would reduced by about 2.4 million.</p> <p>19 Q. What are the tangible and intangible</p> <p>20 assets other than Blaze within the defendants'</p> <p>21 companies that contribute to their overall revenues</p> <p>22 and profits?</p> <p>23 A. As I sit here today, I can't provide a</p> <p>24 full list. There are likely a number of -- And</p> <p>25 you're speaking of profits in total to the company,</p> <p style="text-align: right;">Page 126</p>

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1 correct?
2 Q. Overall revenues and profits?
3 A. I'm sure there are a number of
4 components or factors that play into that. I don't
5 have a laundry list sitting here today.
6 Q. Well, can you tell me anything?
7 A. It could be speed to market, it could
8 be effective pricing, it could be effective
9 management of risk, it could be human capital in
10 terms of having good employees and management, it
11 could be use of the appropriate technologies and
12 applications, it could be effective management of
13 the services it provides in terms of the types of
14 insurance lines that it offers versus others that
15 it's decided to not offer or stop providing.
16 That's a few that I can think of off the top of my
17 head.
18 Q. Well, what else?
19 A. I don't have a laundry list, as I
20 stated. And, again, you're talking about the
21 entire company, and I don't have knowledge as to
22 the entirety of Chubb's offerings and specific
23 factors that would play into their -- driving their
24 profitability for other things, outside of what I
25 looked at in this case.

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1 Q. So can you quantify how Blaze
2 contributes to the revenues and the net profits,
3 can you provide me with a number or a percentage?
4 A. I know based on the law that's not my
5 burden. The apportionment --
6 Q. That's not my question. I'm not
7 asking you what's your burden.
8 A. Based upon --
9 Q. I'd like an answer to my question.
10 A. If I had the information that would
11 allow me to do so, I could provide some sort of
12 apportionment percentage. I don't have information
13 to do so based upon what's been produced in this
14 case.
15 I know that there's a number of
16 applications, I think Mr. Bakewell talks about a
17 thousand or so that are used as part of their
18 binding and renewing policies. I know Mr. McCarter
19 testified that he doesn't even know what those do.
20 But if I had information surrounding
21 all of the inputs that went into their business
22 operations related to binding policies and the
23 policies that use Blaze Advisor and had technical
24 expertise either from company personnel or industry
25 people to assist me, which is what I would

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1 typically do in a patent infringement damages case,
2 understanding that technology one could get to a
3 number.
4 But I will also add that Mr. Bakewell,
5 whose burden it is to do so, didn't provide any
6 opinion as to what the appropriate apportionment is.
7 Q. Just to be clear, though, you've given
8 me all the reasons and excuses, but you do not have
9 an expert opinion as to any quantification of the --
10 the extent to which Blaze contributes to overall
11 revenues and overall net profits, correct?
12 A. I do not have an opinion regarding
13 apportionment, that's correct.
14 Q. Well, you not only don't have an
15 opinion, you don't have the ability to do that
16 based on the information you have, correct?
17 A. And I would state again that it's the
18 defendants' burden, and one would think if it was
19 the burden of the defendants they would want to
20 produce information that would allow one to perform
21 such an analysis.
22 Q. And my question wasn't on burden, my
23 question was on your ability to provide
24 quantification of the amount or the extent or the
25 dollar amount of the contribution of Blaze to

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1 overall revenues and net profits. You don't have
2 an opinion and you have no ability to provide such
3 an opinion based on the information you have,
4 correct?
5 A. The easiest way to say it is I was
6 handcuffed based upon the lack of information
7 available from defendants to perform such an
8 analysis.
9 MR. FLEMING: Okay. I'd like my
10 question read, would you, please? And I'd like an
11 answer to it.
12 (Whereupon, the court reporter read
13 back the following question: "And my question
14 wasn't on burden, my question was on your ability
15 to provide quantification of the amount or the
16 extent or the dollar amount of the contribution of
17 Blaze to overall revenues and net profits. You
18 don't have an opinion and you have no ability to
19 provide such an opinion based on the information
20 you have, correct?")
21 THE WITNESS: Correct.
22 MR. FLEMING: I'll tell you what, it's
23 getting near to noon. Do you want to break for
24 half an hour and then we'll keep going? Is that
25 enough time or -- why don't we go off the record.

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<p>1 THE VIDEOGRAPHER: Going off the</p> <p>2 record. The time is now 11:49 a.m.</p> <p>3 (Break from 11:49 to 12:37.)</p> <p>4 THE VIDEOGRAPHER: We're back on the</p> <p>5 record. The time is now 12:37 p.m.</p> <p>6 BY MR. FLEMING:</p> <p>7 Q. Good afternoon, Mr. Zoltowski.</p> <p>8 A. Good afternoon.</p> <p>9 Q. Before we broke, we were talking about</p> <p>10 quantifying the contribution that Blaze makes to</p> <p>11 overall revenues and net profits. You stated that</p> <p>12 you could do it, but you didn't have the</p> <p>13 information. Have you done such a calculation in</p> <p>14 other copyright cases?</p> <p>15 A. I have performed apportionment</p> <p>16 calculations prior to this case. I don't recall</p> <p>17 which copyright cases, but definitely in a patent</p> <p>18 infringement damages situation.</p> <p>19 Q. What was the product there?</p> <p>20 A. Um, a lot of those cases where</p> <p>21 apportionment becomes an issue are mobile phone</p> <p>22 cases many times, where you have a feature or a</p> <p>23 functionality that's one of many as part of a -- a</p> <p>24 larger product, you know, many times thousands of</p> <p>25 different features or functionalities that may sit</p> <p style="text-align: right;">Page 131</p>	<p>1 could provide information regarding where the real</p> <p>2 value lies in terms of each of the components and</p> <p>3 inputs that go into the process and where that</p> <p>4 connection to revenue is.</p> <p>5 Q. And there hasn't been any impediment</p> <p>6 to you talking with industry experts, I take it?</p> <p>7 A. Uh, no, there has not.</p> <p>8 Q. Okay. And what specific information</p> <p>9 would you need other than what you've stated in</p> <p>10 order to do that calculation?</p> <p>11 A. I think I stated generally what</p> <p>12 information I would need. Again, it would really</p> <p>13 come down to getting a complete understanding of</p> <p>14 the process for binding and renewing policies and</p> <p>15 what drives revenue, and that, again, could include</p> <p>16 information technology, which would be software</p> <p>17 solutions, it could be human capital inputs, there</p> <p>18 could be a number of different factors that fall</p> <p>19 into that.</p> <p>20 Q. How many different factors would there</p> <p>21 be, I mean, millions?</p> <p>22 A. I don't know, and that's part of the</p> <p>23 issue. What I do know from my experience of doing</p> <p>24 these types of cases is it could be ten, it could</p> <p>25 be a million. What it really comes down to is what</p> <p style="text-align: right;">Page 133</p>
<p>1 on a specific chip, and the feature at issue</p> <p>2 related to the patent that's being -- the alleged</p> <p>3 infringement is only one of those thousand features.</p> <p>4 Q. Have you ever done an apportionment in</p> <p>5 a copyright case?</p> <p>6 A. I believe I have. I just can't recall</p> <p>7 which case off the top of my head.</p> <p>8 I don't recall if I've done any when</p> <p>9 I've served as expert, but I know I have done them</p> <p>10 before where I may have managed a case for a --</p> <p>11 another expert.</p> <p>12 Q. And you stated earlier that you could</p> <p>13 do it in this case. How would you go about doing</p> <p>14 it, what additional information do you need?</p> <p>15 A. As I stated previously, I would want</p> <p>16 to learn more about the entire process related to</p> <p>17 how the company, in this case the defendants, is</p> <p>18 generating their revenues in terms of the -- all of</p> <p>19 the different components of that, be it software</p> <p>20 that's used, be it the inputs of manual labor,</p> <p>21 human capital, what other parts of that process</p> <p>22 exists.</p> <p>23 And, then, as I also stated, I would</p> <p>24 rely upon or speak with industry experts, either</p> <p>25 individuals at the company or expert witnesses who</p> <p style="text-align: right;">Page 132</p>	<p>1 is the apportionment and the value of the specific</p> <p>2 intellectual property at issue. For example, you</p> <p>3 could have one feature at issue on a mobile phone,</p> <p>4 but that feature could be incredibly valuable even</p> <p>5 though there might be thousands.</p> <p>6 Q. Uh-huh. Have you ever attempted to</p> <p>7 determine the profits attributable to one software</p> <p>8 program used by some employees in a big</p> <p>9 corporation?</p> <p>10 A. I don't recall. But I have</p> <p>11 experienced with apportionment, like I stated,</p> <p>12 where there might be limited use of a particular</p> <p>13 feature within a larger product.</p> <p>14 (Reporter's Note: Mr. Fleming</p> <p>15 coughs.)</p> <p>16 MR. FLEMING: Excuse me.</p> <p>17 BY MR. FLEMING:</p> <p>18 Q. You were an expert in a case entitled</p> <p>19 Brooks Automation, Inc. versus PTB Sales, Inc.; is</p> <p>20 that right?</p> <p>21 A. That's correct.</p> <p>22 Q. And do you recall what was your expert</p> <p>23 opinion as to damages?</p> <p>24 A. I don't recall the specifics. I think</p> <p>25 it covered a lot of ground, because there were a</p> <p style="text-align: right;">Page 134</p>

1 number of allegations. I think there was trade
2 secret misappropriation, copyright infringement and
3 trademark infringement, and maybe a breach of
4 contract as well.
5 Q. Do you recall what the case was about
6 generally?
7 A. It had to do with cryogenic technology
8 in the semiconductor industry.
9 Q. In that case, do you recall that you
10 opted to only measure statutory damages for
11 infringement because you didn't have sufficient
12 information?
13 A. I don't recall, but I may have done
14 that.
15 MR. FLEMING: Mark this as the next
16 exhibit.
17 THE COURT REPORTER: That's Exhibit
18 460.
19 (Whereupon, Deposition Exhibit No. 460
20 was marked for identification, and a copy is
21 attached and hereby made a part of this deposition.)
22 THE WITNESS: Thank you.
23 BY MR. FLEMING:
24 Q. Is this the initial disclosure expert
25 report that you provided in the Brooks versus PTB

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1 case?
2 A. This appears to be that report, with
3 the qualification that it does not include any
4 schedules.
5 Q. In paragraph 34 on page 13, is that
6 where you provide your opinion relating to the
7 damages from copyright infringement?
8 A. I'm sorry, what page did you say?
9 Q. Page 13, paragraph 34?
10 A. Uh, yes, that's correct.
11 Q. And in this case did you determine to
12 only measure statutory damages for infringement
13 because you didn't have sufficient information?
14 A. I believe in this case I actually
15 didn't have any information related to what
16 actually transpired with these upgrades of these
17 cryo pump software pump -- or cryo -- cryo pump
18 products, and they upgraded the software, and there
19 was no detail as to actually any revenue or any
20 other metrics related to quantification, and as a
21 result, I defaulted to a statutory damages
22 calculation.
23 Q. Well, you didn't say here that there
24 was no information, what you say is that they
25 provided minimal information, right?

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1 A. Correct.
2 Q. So they provided some information?
3 A. Yeah, that there were at least 70
4 times that they updated software, and I believe
5 they may have provided the customer names, but
6 there was no other information related to details
7 of the revenue related to those upgrades.
8 Q. Could that be an appropriate measure
9 of damages here, statutory damages?
10 A. I think that would be up to the trier
11 of fact in terms of if statutory damages would be
12 appropriate.
13 Q. With regard to your expert opinion
14 relating to lost license fees, what expert opinions
15 do you provide other than what Mr. Waid provided
16 you with and the arithmetic you performed in order
17 to create the tables relating to lost license fees?
18 A. I think we discussed this before
19 lunch. But I provided expertise related to
20 understanding what's the appropriate structure of
21 the license based upon the facts and circumstances
22 here and what is the appropriate pricing based upon
23 that structure, and Mr. Waid provided inputs in
24 terms of the quantification piece based upon FICO's
25 standard pricing for the named application

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1 licenses.
2 Q. And what specifically in your report
3 did you provide expert opinions on other than those
4 inputs provided by Mr. Waid and the arithmetic in
5 the graphs?
6 A. I think I just answered that question,
7 but it's a determination of the appropriate
8 structure of the license based upon the information
9 available and the facts and circumstances.
10 Q. The appropriate structure of the
11 license meaning what?
12 A. Oh, Mr. Bakewell doesn't agree that it
13 should be a named application license, so he has a
14 different opinion, that it should be based upon a
15 hypothetical negotiation I believe of an enterprise
16 license, although he didn't quantify any damages
17 from the affirmative perspective in his own opinion.
18 So I would say that that is his
19 expert -- he's providing his expertise and that
20 opinion based upon that expertise. I have my own
21 opinion, which is that's based upon a named
22 application license structure, and that's the
23 expertise I'm providing.
24 Q. Anything other than that?
25 A. No.

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1 Q. The named application license
2 structure was a very structure that Mr. Waid had
3 already provided in his declaration prior to the
4 time you were retained as an expert, right?
5 A. He had provided a quantification based
6 upon that type of license and that declaration,
7 that's correct.
8 Q. And you're not providing expert
9 opinions as to software pricing structures,
10 correct?
11 A. I'm providing expertise related to the
12 lost license fees based upon the pricing structure
13 I determined was appropriate.
14 Q. So if Mr. Waid were to testify and
15 provide the information that he provided you and
16 utilized the graphs that you created based on the
17 information you provided, what additional
18 information would you have to provide beyond what
19 he would testify about?
20 A. I am testifying to the structure of
21 the license. I would believe if you had a company
22 witness testifying as an expert witness related to
23 the structure of a license and the damages related
24 to that, it would likely create some bias, and
25 Mr. Waid I believe did a calculation of a named

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1 application license in his declaration.
2 I don't think there's an opinion as to
3 that's an appropriate structure per se. It simply
4 was a calculation if one were to look at it from
5 that perspective, and it was based upon information
6 at that time, which I think was February 2018.
7 And, therefore, his calculations based upon the
8 sizing matrix are not the same as the results of my
9 calculations because updated information was
10 provided in the meantime.
11 Q. So are you suggesting that the role
12 that you play here or the expertise that you
13 provide is, basically, to act as a mouthpiece for
14 the opinions of Bill Waid?
15 A. I don't believe that's what I said.
16 Q. Okay. And you -- you're not providing
17 any expert opinion relating -- relating to the
18 causal nexus between the use of Blaze and revenues
19 and profits, correct?
20 A. There are others who are providing
21 that information or testimony related to causal
22 nexus and the connection to revenue. However, I
23 will state that based upon my review of information,
24 which includes a number of things, off the top of
25 my head, you know, Mr. Whitener's report and some

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1 of the documentation he cited, as well as I think
2 there was a RFI that was back in 2006 by the
3 defendants related to the entry into the mid-market
4 and -- I'm trying to remember what other
5 documentation I saw. I think there was a white
6 paper that FICO has related to the connection to
7 revenue from Blaze Advisor.
8 There are a number of pieces of
9 information that one could conclude there is a
10 reasonable connection. But, again, I'm not
11 offering those opinions.
12 Q. Okay. So you're not providing an
13 expert opinion as to the causal nexus issue,
14 correct?
15 A. Correct.
16 Q. Okay. And you aren't providing any
17 software industry expertise here, correct?
18 A. I'm not providing -- I'm not putting
19 myself out as an expert in the software industry by
20 due of expertise working on cases related to
21 software and software licenses.
22 Q. And you agree that you didn't attempt
23 to independently verify the gross written premium
24 numbers, you just took them from the -- took the
25 numbers from the interrogatories?

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1 A. I took them from signed and sworn, I
2 believe, verified interrogatory responses from the
3 defendants, correct.
4 Q. And in response to the question, you
5 didn't attempt to independently verify those
6 numbers?
7 A. Uh, no.
8 Q. Okay. Got double negatives there.
9 You agree that you did not take any
10 steps independently to verify the gross written
11 premium numbers, correct?
12 A. I did not perform any analysis to
13 reconcile them to any additional financial
14 information provided in terms of financial statements
15 or reported financials. I don't believe that was
16 possible based upon the way that the information
17 was produced.
18 Q. You state in your reply report at
19 paragraph 4 that "except as reflected herein, my
20 prior opinions have not changed." Can you
21 summarize which of your opinions did change between
22 your first report and your reply report, if any?
23 A. This report lays out my rebuttal
24 arguments in critique of Mr. Bakewell's opinions,
25 and nothing has changed in terms of my opinion that

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